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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1127

E. J. DELANEY CORPORATION AND
SKI KIT, INC.,

Petitioners,

v.

BONNE BELL, INC. AND JESS BELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

E.J. Delaney Corporation and its affiliate Ski Kit, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 11, 1975.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 525 F.2d 296. The opinion of the United States District Court for the District of Colorado denying

respondents' motion for judgment notwithstanding the verdict and new trial (App. 25a-43a) is not officially reported but is printed at 1975-2 CCH Trade Cases ¶60,419.

JURISDICTION

The judgment of the court of appeals (App. 24a) was entered on November 11, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

What are the elements of the offense of "attempt to monopolize" under Section 2 of the Sherman Act; in particular, is a specific determination of the defendant's quantitative market share essential when the evidence shows both a specific intent to monopolize a relevant market and predatory conduct?

STATUTE INVOLVED

This treble damage action under §4 of the Clayton Act (15 U.S.C. §15) involves an alleged violation of Section 2 of the Sherman Act (15 U.S.C. §2), which provides in part:

> "Every person who shall * * * attempt to monopolize * * * any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony * * *."

STATEMENT

Respondent Bonne Bell, Inc. is a manufacturer of cosmetics and toilet items; respondent Jess Bell is its president and a major stockholder. In 1970-71 Bonne Bell's sales of cosmetics and toilet items were at an

annual rate of approximately $17,000,000 (J.A. VII 58).[1] While these sales were relatively small in relationship to the total sales of all manufacturers of such products, Bonne Bell focused upon a specialized market. As Mr. Bell testified, "In 1962 we developed a sports approach. We wanted to appeal to the sports minded audience, principally skiers and tennis players, a winter and summer sport" (J.A. VII 57). These efforts were successful, and the court of appeals characterized as follows the situation at the time of the events upon which petitioner's claim is based (App. 3a, *infra*):

> "By the latter part of 1970 Bonne Bell had established its products in the ski market. Bonne Bell's advertising director related to Delaney Corporation's president at a December 14, 1970 meeting: 'We have worked very hard to get a hold on the ski market, and Jess Bell doesn't want any competition in that market.' " [See J.A. I 92]

Mr. Bell, in a contemporaneous letter (PX 39), referred to "our total involvement since 1966 to establish Bonne Bell cosmetics in the ski market."

Bonne Bell manufactured and promoted to skiers a number of "ski oriented products," such as high altitude cream and tanning and anti-chapping products (J.A. I 88; IV 106; V 59-60, 62-63, 67-74). Its ski market promotions included advertising in ski areas (J.A. I 87-89),

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[1] "J.A." refers to the Appendix filed in the court of appeals. That Appendix consists primarily of seven volumes of trial testimony, bound together; each is designated by a roman numeral and separately paginated. The Appendix also begins and ends with other materials, which are paginated as J.A. 1 through 80. In addition, a separate looseleaf volume containing the trial exhibits was filed in the court of appeals; these are designated as PX 1 through 89 and DX B through LLL.

sending a team of young women to various ski areas (J.A. V 39), obtaining endorsements from well known skiers (J.A. VII 61-62; PX 79), advertising in ski magazines and mounting displays in ski shops (J.A. VII 88), and distributing kits of sample products to skiers (J.A. IV 106).

Beginning in 1967, Bonne Bell developed a promotional relationship with the United States Ski Team, its sponsor the United States Ski Association (USSA) and USSA's fund-raising affiliate the United States Ski Educational Foundation (USSEF). Bonne Bell's contract with USSEF (PX 4; see also J.A. IV 96; VII 62-64) gave Bonne Bell "the exclusive right to utilize the Ski Team Endorsement [defined as the name and logo of the United States Ski Team] on and in connection with cosmetic products and beauty aids," in return for royalty payments and other consideration. In addition, USSEF agreed to "cooperate with Bonne Bell in its efforts to promote the sale and acceptance of its products." Accordingly, Bonne Bell promoted its products to the ski market as "the official cosmetic of the United States Ski Team" and as "approved" by it (J.A. VII 65-67).

Petitioner E.J. Delaney Corporation (of which petitioner Ski Kit, Inc. is an affiliate[2]) had for some years been involved in advertising aimed at skiers; in particular, Delaney maintained in some 60 ski areas "weather stations" displaying skiing information and illuminated placards advertising the products of various manufacturers including Bonne Bell (J.A. I 5-8, 11-12). In 1969, Delaney conceived the idea of promoting cosmetics,

[2] For all practical purposes in this litigation, the two petitioners are a single entity; they are referred to collectively as "Delaney".

toilet items and other products to skiers by distributing "Ski Paks" containing samples. A variety of manufacturers engaged Delaney to promote their products to skiers in this manner, and Delaney devoted a substantial amount of market research and other effort to determining how to distribute the "Ski-Paks" most effectively to the ski market (J.A. I 18-33). In November 1970, Delaney initiated discussions with USSA which eventuated in a proposal that Delaney and USSA cooperate in selling the Ski Paks for the relatively modest price of one dollar each as a fund-raising device for the United States Ski Team, dividing the proceeds between Delaney and USSA (or USSEF). The proposal was received with great interest by Paul Parker, the fund-raising chairman of USSA (J.A. I 33-50; II 126-131; III 76-78).

Mr. Parker presented the matter to the Board of Trustees of USSEF at its meeting on December 6, 1970. The Board unanimously voted that "the Skier's Pak fund raising proposal be approved subject to approval by IMC [a firm that handled Ski Team endorsements] and our Auditors" (PX 35; J.A. III 3-6). Mr. Parker reported this favorable action to Delaney (J.A. I 74-83).

The events that followed the December 6 USSEF meeting were the subject of dispute at the trial. It was not, however, disputed that Bonne Bell objected to the Delaney-USSEF joint fund-raising program, as inconsistent with its own relationship with USSEF, and that USSEF subsequently withdrew its approval of the program. In a December 14, 1970 letter, Mr. Bell stated that "we are opposed to any plan that would use the U.S. Ski Team to help sell competitive products" and that Bonne Bell's objection was for the purpose of protecting "our investment in the U.S. Ski Team endorsement and our total involvement since 1966 to establish Bonne Bell cosmetics in the ski market" (PX 39).

In an effort to eliminate any possible conflict with Bonne Bell's endorsement rights, Delaney suggested that the Ski Team logo be deleted from the Ski Paks and even that a specific disclaimer of any endorsement appear on each Pak. These suggestions did not, however, succeed in reviving USSEF's interest in a joint promotion, and there was evidence indicating that USSEF's position was dictated by Bonne Bell (J.A. I 97-103; IV 86-89). Delaney then decided to proceed unilaterally, without merchandising assistance from USSEF, USSA or the Ski Team. Accordingly, Delaney prepared and distributed a large number of "mailers" inviting skiers to send Delaney a dollar each for Ski Paks; these mailers made no reference to the U.S. Ski Team other than the statement "Net proceeds donated to the U.S. Ski Team" (J.A. I 106-108; PX 52).

Delaney's distribution of these mailers met with retaliation from both USSA-USSEF and Bonne Bell. Charles Gibson, president of USSA and USSEF, called Delaney to insist that it cease distributing the mailers, and followed up with a letter to the same effect (J.A. I 110-111; PX 53). A week later, Mr. Gibson circulated a memorandum to various skiing organizations and publications warning them against cooperating with Delaney's promotion, stating that it "could conceivably constitute fraud on the public" and asking that they "make all ski shops and ski areas in your locality aware that the sale of these packs is not an authorized fund-raising tool" (PX 58). In addition, Mr. Gibson had Paul Parker (the fund-raising chairman) send a letter to the Massachusetts Attorney General's office attacking Delaney's promotion (J.A. III 36-37).

Bonne Bell took separate action of a different sort against Delaney. Through its advertising agency, Chirug &

Cairns, Bonne Bell threatened to cancel its contract for advertising at Delaney's "weather stations" (see p. 4, *supra*) unless Delaney abandoned its marketing of the Ski Paks (J.A. V 49; I 116; VII 24, 41; PX 42). The "weather station" contract was effective until May 1972 (PX 7) and a payment of $15,000 was due to Delaney on July 1, 1971 (PX 59). Bonne Bell nonetheless abrogated the contract on March 16, 1971, the day after USSEF finally terminated discussion of the joint Ski Pak proposal (PX 68, 69; see J.A. VII 46-47).

The complaint below alleged (1) that Bonne Bell and Jess Bell had conspired with Messrs. Parker and Gibson and others, in violation of Section 1 of the Sherman Act, to prevent Delaney from marketing its Ski Paks and (2) that Bonne Bell had attempted, in violation of Section 2 of the Act, to monopolize the trade and commerce throughout the United States in "sales to skiers of cosmetic, health and toilet items and/or kits containing such items." Both charges were submitted to the jury, which returned a general verdict (before trebling and assessment of attorneys' fees) in the amount of $159,063.50.[3]

After the district court's denial of a motion for judgment notwithstanding the verdict and for a new trial (App. 43a, *infra*) defendants raised three issues on appeal: (1) the sufficiency of the evidence supporting the Section 1 conspiracy charge, (2) the adequacy of the jury instructions on definition of the relevant market for purposes of the Section 2 claim, and (3) the sufficiency of the evidence concerning the alleged attempt to

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[3] Messrs. Parker and Gibson were named as defendants, but the claims against them were settled and dismissed by stipulation in the course of the trial.

monopolize. There was no challenge to the damage determination. The court of appeals affirmed with respect to the Section 1 charge[4] and the relevant market instructions, but found a deficiency in the evidence on attempt which we elaborate in the next paragraph. Since the verdict was general, the court of appeals remanded for a new trial on all issues.

With respect to attempted monopolization, the court of appeals held that the district court had properly guided the jury in instructing that "to find for the Plaintiffs, you must find that sales to skiers of cosmetic, health and toilet items and/or kits containing such items constitutes a separate and distinct product market" nationwide in scope (App. 22a-23a, *infra*).[5] It also found no lack of evidence to support the jury's finding (under the instructions given) that Bonne Bell had the *specific intent* to monopolize that market (App. 20a-21a, *infra*). The deficiency, in the view of the court of appeals, was that

> "There was no evidence offered as to the corporate defendant's sales volume in the 'skier's cosmetic market' nor the sales volume therein of anyone else. *There was no evidence as to the total sales in the market.* There was no evidence as to the corporate

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[4]Since the Section 1 charge is not in issue here, we have omitted from the Statement much of the evidence relating only to the existence of a conspiracy.

[5]The instructions on attempted monopolization appear at J.A. 45-47.

Such a finding as to the product market would plainly be consistent with the approach of *United States v. Grinnell Corp.*, 384 U.S. 563. See, *e.g.*, *Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc.*, 516 F.2d 1092 (7 Cir. 1975) ("service of representing college newspapers in the placement of national advertising was the relevant market"). There has been no issue as to the propriety of a nationwide geographic market.

> defendant's power as to pricing or as to any other party's power." (App. 20a, *infra*; emphasis in original.)

The district court had instructed the jury that it must find "a reasonable probability that a monopolization will sooner or later occur" (J.A. 46). In ruling upon the post-trial motion, it held that "there must be some proof of the defendant's *power* to monopolize," but expressed the view that such proof need not necessarily take the form of a market share analysis (App. 34a-35a, *infra*). On this point, the district court adopted the language of *Dobbins v. Kawasaki Motors Corp.*, 362 F.Supp. 54, 60 (D. Ore. 1973):

> "[W]here a plaintiff has not established a substantial claim of restraint of trade, he must prove dangerous probability of success through sufficient market power. On the other hand, when a plaintiff can establish a substantial claim of restraint of trade, that evidence itself demonstrates a specific intent to monopolize so overwhelmingly so as to itself be proof of a dangerous probability of success."

The district court found this alternative test satisfied "since the evidence permitted a reasonable inference of a substantial restraint of trade" (App. 35a-36a, *infra*). The court of appeals disagreed forcefully, holding that an attempt to monopolize could not be established "absent specific proof of Bonne Bell's market power" (App. 11a, *infra*).

REASONS FOR GRANTING THE WRIT

This Court has never clearly delineated the elements of the offense of "attempt to monopolize" under Section 2 of the Sherman Act. In attempting to fill the gap, the lower courts have devised a variety of formulations. As

we shall explain, the formulation that was the basis for the reversal of the judgment below—requiring specific evidence of quantitative market shares—is in conflict with recent decisions by other courts of appeals. The writ should be granted both to resolve this conflict and to settle the important antitrust questions underlying the conflict.

1. This Court's prior decisions do not adequately define the offense of attempt to monopolize.

It appears universally agreed that there can be no Section 2 "attempt to monopolize" without a specific intent to monopolize a particular market. That much is clear from this Court's opinions going back to the classical statement in *Swift & Co. v. United States*, 196 U.S. 375, 396:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary *in order to produce* a dangerous probability that it will happen. Com. v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55. But when that intent and the *consequent* dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." [Emphasis added.]

The specific intent requirement was even more clearly reiterated in *United States v. Griffith*, 334 U.S. 100, 105-106; *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532; and *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626.

This Court has not, however, made clear what else, if anything, is needed to render illegal acts done with such a specific intent. There is no indication in *Swift* that anything else is needed; the "dangerous probability that [actual monopolization] will happen" was there referred to as a consequence of the specific intent and not as a distinct element to be otherwise proved. *Columbia Steel* suggests affirmatively that the specific intent suffices, stating that "even though the restraint effected may be reasonable under §1, it may constitute an attempt to monopolize forbidden by §2 if a specific intent to monopolize may be shown" (334 U.S. at 531-532). *United States v. duPont & Co.*, 351 U.S. 377, 395-96 n. 23, distinguished a number of the Court's prior decisions on the ground that they involved merely attempts or conspiracies to monopolize and therefore "the scope of the market was not in issue." Similarly, *American Tobacco Co. v. United States*, 328 U.S. 781, 789, noted that "Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, *i.e.*, to exclude actual and potential competitors from the cigarette field." On the other hand, the opinion in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, asserted—without reference to the Court's prior discussions of attempt – that "To establish monopolization *or attempt to monopolize* a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved" (emphasis added). The Court did not, however, articulate the manner in which exclusionary power might be appraised in an attempt case.

This very limited and perhaps somewhat inconsistent line of decisions has, accordingly, left it to the lower courts to define comprehensively the elements of the attempt offense.

2. The court of appeals' requirement of a quantitative market share analysis conflicts with decisions of other courts of appeals.

In requiring "specific proof of Bonne Bell's market power," the decision below is in agreement with decisions of the First and Eighth Circuits.[6] But it is in direct conflict with the decisions of the Ninth and Fourth Circuits, and is inconsistent with the reasoning of the Seventh Circuit.

The Ninth Circuit's conflicting position has most recently been articulated in *Pacific Coast Agricultural Export Assn. v. Sunkist Growers, Inc.*, 1975-2 CCH Trade Cases ¶60,617 at p. 67,724 (9 Cir. No. 74-1094, etc., Nov. 11, 1975):

> "[T]he requisite 'dangerous probability' of success can be inferred from either specific intent coupled

[6] *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 550 (1 Cir. 1974), cert. denied 421 U.S. 948, excluded from Section 2's coverage "anti-competitive behavior by a single firm which does not approach monopolization" and held that "a dangerous probability of successful monopolization" "must be assessed in the context of a relevant market." The same court in *Walker v. Providence Journal Co.*, 493 F.2d 82, 87 (1 Cir. 1974), had rejected an attempt claim because "plaintiffs * * * have made no proof that the [defendant] has anything approaching a monopoly." The Eighth Circuit's position is most clearly stated in *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 285-286 (8 Cir. 1973), cert. denied 414 U.S. 445, 461, holding that "one must look to economic data to determine the impact of the purported illegal activity on the market which is the subject of the attempt to monopolize."

> with monopoly power *or* from 'proof of specific intent to set prices or exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose.' "

The court's quotation was from its earlier decision in *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 12 (9 Cir. 1973), cert. denied 417 U.S. 932, reviewing all of the Ninth Circuit attempt cases since the controversial decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9 Cir. 1964), cert. denied 377 U.S. 993. *Hallmark* concluded that "evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made" (489 F.2d at 12-13). This proposition was, as we have noted, the basis for the district court's decision below, and the court of appeals' specific disagreement with it was the basis for the reversal.[7] Accordingly, there is a direct conflict between the Tenth Circuit's requirement of specific evidence of market power in the decision below and the Ninth Circuit rule that such evidence is not needed if there is evidence of a substantial restraint of trade.

The Fourth Circuit appears also to have rejected the principle applied below, having affirmed without discussion of the point a district court decision that an attempt claim could be established by proof that "defendants believed that * * * they could effectively exclude [plaintiff] from the entire market, and acted with that specific intent as their preponderant motive." *American Football*

[7] As we have noted (p. 9, *supra*), the district court adopted language from *Dobbins v. Kawasaki Motors Corp.*, 362 F.Supp. 54 (D. Ore. 1973), which applied the Ninth Circuit rule. It is pertinent that *Dobbins* was decided by Judge Skopil, who (sitting by designation) was the author of the Ninth Circuit's *Hallmark* decision.

League v. National Football League, 205 F.Supp. 60, 65 (D. Md. 1962), aff'd 323 F.2d 124 (4 Cir. 1963); see also *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1093 (D. Md. 1969).

The other courts of appeals appear not to have decided the specific question of the need for quantitative market proof in support of a claim of attempt to monopolize.[8]

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[8]The Second Circuit held in *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2 Cir. 1961), that "where the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent, to monopolize," making market proof irrelevant; however, a district court in that Circuit has held a Section 2 *attempt* distinguishable from a Section 2 *conspiracy* and accordingly required market proof. *United States v. Chas. Pfizer & Co.*, 245 F.Supp. 737 (E.D.N.Y. 1965). The Fifth Circuit has specifically reserved decision in its most recent opinion, noting that "[t]here currently exists some dispute over whether either attempts to monopolize or conspiracies to monopolize require proof of the relevant market or ability to achieve monopoly power," but "[w]e do not resolve this conflict over the requisites of conspiracies or attempts, for we find that plaintiffs have satisfied the evidentiary requirements of the offense of monopolization." *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1304 (5 Cir. 1971), cert. denied 404 U.S. 1047. The Third Circuit has recently stated that an "essential element of the offense is that the actor have sufficient market power to come dangerously close to success," but has not indicated how such power is to be appraised. *Coleman Motor Co. v. Chrysler Corp.*, 1975-2 CCH Trade Cases ¶60,592 at p. 67,622 (3 Cir. No. 74-1529, Nov. 14, 1975). Finally, although the Sixth Circuit has not spoken to the point, a district court decision in that Circuit has asserted that even where the proof shows an absence of market power "an attempt to monopolize may still be found where defendant has engaged in acts and practices so anti-competitive that an intent to monopolize may be inferred." *Huron Valley Publishing Co. v. Booth Newspapers, Inc.*, 336 F.Supp. 659, 662 (E.D. Mich. 1972); but see *Zenith Vinyl Fabrics Corp. v. Ford Motor Co.*, 357 F.Supp. 133 (E.D. Mich. 1974), aff'd in an order not for publication or citation, 6 Cir. No. 73-1537 (June 5, 1974), cert. denied 419 U.S. 967.

Instruction can, however, be taken from Mr. Justice Stevens' general discussion of the attempt offense in his opinion for the Seventh Circuit in *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 597-599 (7 Cir. 1971), cert. denied 405 U.S. 1066. While noting that the defendant on the counterclaim had an approximate one-third market share, the court went on to discuss the significance of that fact and the elements of the offense as follows (452 F.2d at 598):

> "Plaintiff's actual position in the industry is not, however, the sole test of violation of §2. By condemning attempts to monopolize, that section directs itself against dangerous probabilities as well as the completed result.
>
> "A reliable or accurate measure of the actual likelihood that plaintiff would have achieved monopoly status * * * is, of course, not possible. However, we do not understand the 'dangerous probability' test to involve an evaluation of the actual likelihood that an attempt would have succeeded if not frustrated by an intervening event. Rather, it requires an appraisal of the alleged offender's ability to achieve the forbidden result, his intent, and the nature of his overt actions. In an antitrust context we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct. The ultimate concern is the firm's actual or threatened impact on competition in the relevant market." [Footnotes omitted.]

The court went on to hold that each of these three elements of the offense was satisfied on the facts of the case: (1) The "impressive size" of the defendant on the counterclaim, its strong patent position and its "highly profitable" arrangements gave it "the *capacity* to make a serious attempt to acquire monopoly status" in the

narrowly defined relevant market to which the parties had stipulated (*ibid.*; emphasis added). (2) Defendant's undeniable *intent* "to acquire the power to exclude competition from [a] portion of the market" was given substance by the fact that "[f]ulfillment of its objectives would have significantly enhanced its market position" (*ibid*). (3) Defendant's *conduct* in the prosecution of its patent application was "appropriately characterized as 'predatory' " (452 F.2d at 599).

The *Kearney & Trecker* analysis of the elements of the attempt offense is consistent with the district court's application of the Ninth Circuit rule below and inconsistent with the rationale of the reversal by the court of appeals. Where—as in the present case—there is no question as to the defendant's intent, the *Kearney & Trecker* analysis requires only evidence of capacity and offensive conduct from which can be inferred a serious "actual or threatened impact on competition in the relevant market." The evidence below as to the uniqueness of the skiers' cosmetic market and Bonne Bell's "hold" on it – as well as Bonne Bell's success in actually excluding Delaney – more than sufficed to establish a *capacity* to make a serious attempt. Both the conspiratorial conduct held sufficient to support a Section 1 verdict and Bonne Bell's use of its "weather station" contract as leverage to coerce Delaney plainly warranted an inference of *predatory conduct.*

3. Definition of the attempt offense is an important question of antitrust law that should be settled by this Court.

An authoritative statement of the elements of an attempt to monopolize under Section 2 is long overdue and timely in view of the renewed public concern with

antitrust enforcement. An official of the Antitrust Division of the Department of Justice has noted the underutilization of Section 2 that has resulted from uncertain, if not excessively restrictive, interpretations of its scope – as well as the desirability of a reasonably liberal definition of the attempt offense:

> "In recent years, the Government has argued strongly against limiting the attempted monopoly doctrine to circumstances where there is a showing of dangerous probability of monopolization within a relevant market. In our *amicus* brief in *Highland Dairy Inc. v. Kroger,* [402 F.2d 968 (8 Cir. 1968)] we followed the Ninth Circuit's lead and argued that the Section 2 attempt prohibition 'reaches acts by one competitor that exclude another from the market, when the acts in themselves are so predatory, unfair or clearly without legitimate business purpose as to be patently unreasonable restraints.' "[9]

The fundamental question is when the attempt clause comes into play: Does it regulate behavior only at the verge of successful monopolization, or does it also forbid predatory conduct at an earlier stage of the process? The rationale for the latter view was perhaps best articulated in one of the classics of the antitrust literature, Turner,

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[9]Baker, *Section 2 Enforcement—The View From the Trench,* 41 ABA Antitrust L.J. 613, 620 (1972) (footnotes omitted). The article is also printed at 5 CCH Trade Reg. Rep. ¶50,145. At the time, Mr. Baker was Director of Policy Planning in the Antitrust Division.

The authorities and issues relating to Section 2 attempts to monopolize are also discussed at length in Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Mich L. Rev. 373 (1974).

Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281, 305 (1956):

> "The kind of conduct that typically establishes the requisite 'specific intent' in attempt and conspiracy cases is clearly conduct which has no social or economic justification. No benefits can be expected, at least in the long run, from predatory price-cutting, coercive refusal to sell, and similar abuses of economic power. If defendants are attempting to drive someone out of the market by foul means rather than fair, there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1976

APPENDIX A

Filed Nov 11, 1975

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1751

E. J. DELANEY CORPORATION, and SKI KIT, INC.,	)	
Plaintiffs–Appellees,	)	Appeal from the
v.	)	United States District Court
BONNE BELL, INC. and JESS BELL,	)	for the District of Colorado
Defendants–Appellants.	)	(D.C. No. C-3755)

Sidney Dickstein, Washington, D. C. (Alan Pick, Washington, D.C., and Jack D. Henderson, Denver, Colorado, on the Brief) for Appellees.

Frank Seth Hurd, Cleveland, Ohio (Mark O'Neill and Jason C. Blackford, Cleveland, Ohio, on the Brief; Of Counsel: Robert H. Harry, Denver, Colorado) for Appellants.

Before SETH, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Bonne Bell, Inc. (Bonne Bell) and Jess Bell (Bell), president of Bonne Bell,[1] appeal an adverse jury verdict based on violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2.[2]

Bonne Bell is an Ohio corporation engaged in the manufacture and sales of toiletries and cosmetics throughout the United States. In 1966 Bonne Bell initiated a "total involvement" to establish its cosmetics in the ski market. This involvement included advertising to the skiing market via ads placed on the weather stations of Delaney Corporation, plaintiffs-appellees.

During the latter part of 1968, Bonne Bell entered into a contract, amended January 9, 1969, with the United States Ski Association (USSA) under which Bonne Bell was accorded the exclusive United States Ski Team (Ski

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[1] Hereinafter collectively referred to as appellants.

[2] 15 U.S.C.A. §1 provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements. . . .

15 U.S.C.A. §2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Team) endorsements for its cosmetic products and beauty aids. This contract designated Bonne Bell as the official cosmetic of the Ski Team.

The contract provided, inter alia, that: Bonne Bell would have the exclusive right to utilize the Ski Team endorsement for all of its cosmetic products and beauty aids provided they had first been examined and approved by the USSA; Bonne Bell would provide reasonable quantities of its products for the personal use of members of the Ski Team; Bonne Bell would pay a yearly minimum retainer of between $25,000 and $50,000; and that Bonne Bell would pay a royalty of two tenths of one percent (.2%) of the total value of the goods shipped under the agreement. In addition, the contract provided that the USSA would work with Bonne Bell to promote the sale and acceptance of its products.

By the latter part of 1970 Bonne Bell had established its products in the ski market. Bonne Bell's advertising director related to Delaney Corporation's president at a December 14, 1970 meeting:

> We have worked very hard to get a hold on the ski market, and Jess Bell doesn't want any competition in that market.

Delaney Corporation was organized in 1964 by E. J. Delaney (Delaney) in an effort to bring advertising from national advertisers to the ski market by way of weather station advertising displays located in ski resort areas. The "stations" were generally four feet high and seven feet long, equipped with "instrumentation such as wind direction, wind velocity, meters, temperature, barograph, which records barometric pressure, and a little chart to interpret what you read." The stations included bulletin boards for posting trail conditions, upcoming events, and

ski activity. They were "surrounded by back lighted advertisements" which were sold to advertisers. By 1970 Delaney Corporation was a profitable enterprise with sixty (60) weather stations located throughout the United States. Its advertisers at that time numbered many national accounts including Bonne Bell.

During its initial years of operation Delany Corporation distributed samples of its advertisers' products to ski shops in the areas where it operated, without additional charge by Delaney Corporation. By 1970 Delaney Corporation had contracted with a number of suppliers for the distribution of their samples via a "skiers-pak" which included, among other items, cosmetics and toiletries, whereby Delaney Corporation was paid a set fee by each supplier for each "pak" distributed.

In an effort to assure distribution of the sample "paks", Delaney Corporation contacted the National Ski Area Association and the USSA. It proposed to the USSA that each "pak" sell for one dollar and that 40% of the total receipts be remitted to the Ski Team. After the "skiers-pak" proposal was presented to the Board of the United States Ski Foundation, the fund raising segment of the USSA, it was approved subject to approval by the Foundation's auditors and the International Merchandising Corporation which supervised the Ski Team's endorsement program.

When questioned relative to the distribution of the "skiers-pak", Bonne Bell voiced its objection to the promotion of cosmetics and beauty aids in a manner suggestive of the USSA's endorsement, in view of its exclusive endorsement contract with USSA. Bonne Bell's position, essentially, was that it did not object to the distribution of the "pak" if it did not contain cosmetics

or toiletries or if the distribution was made without reference to or indication of an endorsement from USSA.

Thereafter, even though Delaney Corporation had mailed out between "70,000 and 80,000" fliers advertising its "pak" to ski shops, ski areas, ski patrols, and ski clubs, relating that the net proceeds of the "pak" sales would go to the Ski Team, and although it had modified its proposal to USSA, the Foundation voted not to accept the "pak" proposal. Delaney Corporation later distributed approximately 23,000 "paks" by means of an agreement entered into with the United States Olympic Committee.

Delaney Corporation brought suit against Bonne Bell and its president[3] on July 30, 1971, alleging, inter alia, that: USSA had made many endorsement and promotional contracts with numerous commercial enterprises; a USSA endorsement has a unique value for the sale of products in the ski market; in return for a guaranteed annual payment and a percentage of sales to USSA, Bonne Bell was allowed the exclusive right to utilize the Ski Team endorsement in connection with its cosmetic products and beauty aids; Delaney Corporation's "Skiers Holiday Pak" which contained health, toilet, and food items of use to skiers was initially unanimously endorsed by the Foundation Board subject to approval; the "skiers-pak" was a profit-sharing promotion which did not contain any endorsement of the Ski Team; based on the Board's initial approval, Delaney Corporation arranged for the distribution of the paks; thereafter Bonne Bell and other individuals combined and conspired with the USSA and its Foundation Board to cause them to

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[3]Several officers of USSA were initially named, but they were dropped prior to trial.

refuse to further deal with Delaney Corporation; and, the actions of Bonne Bell were violative of the anti-trust laws of the United States, creating and resulting in an unreasonable restraint of trade and commerce and an unlawful combination and conspiracy in restraint of trade and commerce in sales to skiers of cosmetic, health, and toilet items.

Trial was to a jury. Delaney Corporation was awarded a general verdict of $159,063.50, which was trebled, together with the Court's allowance of attorney fees of $48,850.00 to Delaney Corporation pursuant to 15 U.S.C.A. §15. Bonne Bell filed several post-trial motions, including a motion for judgment notwithstanding the verdict (n.o.v.) or, in the alternative, for a new trial, and for assessment of reasonable attorney fees, each of which were denied.

In denying these motions and upholding the jury verdict, the Trial Court initially held, inter alia, that: Section 1 of the Sherman Act is directed at the *means* of illegal conspiracies in restraint of trade; Section 2 of the Act is aimed at outlawing the *ends* of anti-competitive behavior; and that the purpose of the two sections is to prohibit monopolization and lesser forms of anti-competitive behavior which unreasonably restrain commerce. The Court further held that the jury could have reasonably found that: the relevant market was the ski market; Bonne Bell acted with others to extend the operation of the endorsement agreement beyond its legitimate effects; *a dangerous probability of monopolization existed, even absent specific proof of Bonne Bell's market power*; Delaney Corporation had a business or property interest which was damaged by Bonne Bell; and that Delaney's inability to distribute was a result of appellants' conduct and was not caused by some other, unrelated condition.

On appeal appellants contend that: (1) they are entitled to a judgment as a matter of law with respect to appellee's claim that they violated §1 of the Sherman Act; (2) appellee failed to present sufficient evidence in proof of a violation of Section 2 of the Sherman Act; (3) a new trial should be ordered; and (4) the Trial Court erroneously instructed on the relevant market.

I.

Appellants contend that they are entitled to judgment as a matter of law with respect to appellees' claim that they conspired or combined to restrain its trade in violation of §1 of the Sherman Act. They note that appellees conceded that the exclusive endorsement contract was not illegal per se and that in order to prove a §1 claim appellees must offer evidence from which "reasonable minds might conclude that Bonne Bell and Jess Bell conspired or combined – to restrain, unlawfully, Delaney's lawful trade." Appellants argue that appellee did not prove a conspiracy or combination, that the contract was not intended to nor could it affect competition or market structure or normal economic forces in the cosmetic and beauty aid market, and that even had the Board voted against appellees' promotion solely because of the endorsement contract and Bonne Bell's objections, that these actions could not be held to be an unlawful restraint of trade nor could they be deemed violative of §1, *supra*.

In denying appellants' motions for a directed verdict and judgment n.o.v. on the §1 claim, the Trial Court found that:

> Defendant contends that the evidence cannot support any inference of their (sic) participation in a conspiracy in restraint of trade. --- Although the

endorsement agreement - - - is not a per se violation - - - it is not unreasonable for the jury to view the sequence of events from late 1970 until the spring of 1971 as evidence of an ongoing conspiracy. - - - The defendant's assertion of its admittedly valid contractual rights did not occur in a vacuum, but rather in the specific context of Delaney's proposals to USSEF. The jury might well have found that Bonne Bell, in concert with agents of USSEF, acted *to extend the operation* of the endorsement agreement beyond its legitimate effects. - - - It was quite reasonable for the jury to conclude (1) that Bonne Bell used their exclusive endorsement contract and other means with the intended effect of keeping Delaney out of the relevant market; and (2) that agents of USSEF understood and acquiesced in that purpose. Such conclusions permit the ultimate findings of a *combination* to suppress competition.

> Finally, defendants emphasize that all the evidence adduced at trial has a non-conspirational explanation. In no precedent cited by defendants or discovered by the court's own research has the possibility of innocent motive prevented the inference of conspiracy, where such inference was otherwise reasonable.

We observe, preliminarily, that the purpose of awarding treble damages to private parties was *not merely* to provide private relief, but to serve as an incentive to encourage the high purpose of enforcement of the antitrust laws. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Lemke v. Enid Automobile Dealers Association, 456 F.2d 1361 (10th Cir. 1972).

We have held, as contended by appellants, that a manufacturer may select customers to whom he will sell so long as his conduct has no monopolistic or market

control purpose. Adolph Coors Company v. Federal Trade Commission, 497 F.2d 1178 (10th Cir. 1974), cert. denied 419 U.S. 1105 (1975); Colorado Pump & Supply Company v. Febco, Incorporated, 472 F.2d 637 (10th Cir. 1973), cert. denied 411 U.S. 987 (1973).

The exclusive endorsement contract, albeit valid on its face, did present an issue of fact to be determined by the jury, to-wit: whether the exclusive endorsement, on the basis of the facts presented, established a Section 1 violation. Paramount Film Distributing Corporation v. Village Theatre, Inc., 228 F.2d 721 (10th Cir. 1955). We have recognized that in making such a determination the jury is entitled to considerable latitude:

> - - - it is not necessary in a case of this kind that there be direct evidence of the existence of a conspiracy of the kind charged in the complaint. More often than otherwise, direct evidence of such a conspiracy is not available. But it may be proved by a development and collation of the circumstances. It may be inferred from the things said and done. Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 34 S.Ct. 951; 58 L.Ed. 1490; Bordonaro Bros. Theatres v. Paramount Pictures, 2 Cir. 176 F.2d 594.
>
> Lowe's, Inc. v. Cinema Amusements, 210 F.2d 86 (10th Cir. 1954) at page 93, cert. denied 347 U.S. 976 (1954).

The character and effect of a conspiracy is not to be judged by viewing its separate parts, but only by looking at it as a whole. United States v. Armour & Co., 137 F.2d 269 (10th Cir. 1943). It is also clear that conspiracies may be implied from a course of dealing and other circumstances. American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), aff'd. 328 U.S. 781 (1946);

United States v. Wohl Shoe Company, 369 F.Supp. 386 (D.N.M. 1974).

Applying these standards to the facts of this case, we hold that there is sufficient evidence from which the jury could have found that appellants conspired to prevent appellees' distribution of their "skiers-pak". It is undisputed that in 1966 appellants initiated a "total involvement" to establish their cosmetics in the ski market, and that by late 1970 they believed that they had a "hold" on that market; they were opposed to all competition; and that although the Foundation Board was enthusiastic upon its initial review of the "skiers-pak" proposal as a fund-raising promotional, thereafter, when objections were lodged by Bonne Bell, the Board refused to endorse the "pak" as a fund raiser. The jury was entitled to find that as a result of appellants' actions, appellees were precluded from distributing its "skiers-pak" even though the pak was a promotionally oriented fund raising device which, although it included the distribution of cosmetics and toiletries to the skiing market, did not purport to carry the endorsement of USSA. In light of these facts, the jury could reasonably conclude that appellants' exclusive endorsement contract was utilized in an illegal conspiracy in the restraint of trade, violative of 15 U.S.C.A. §1, *supra*.

II.

Appellants contend that appellees failed to produce evidence from which the jury might infer all of the necessary elements of the offense of attempting to monopolize prohibited by §2 of the Sherman Act, and that, accordingly, they are entitled to judgment as a matter of law on that issue. Appellants argue that a §2 violation requires showing a sufficient economic power in

a relevant market to create a dangerous probability that the intended monopolization will succeed.

Appellees tendered and the Trial Court admitted in evidence their (Plaintiffs' below) Exhibits 84 and 84A, which in summary, reflect: (a) For the period February 1, 1970 through June 30, 1971, a profit, after selling expenses, from 200,000 Skiers Holiday Paks of $54,234.00 and a net profit from the same sales of $27,435.72; and (b) a net loss for the period February 1, 1970 through November 30, 1972 of $199,084.58, and a net loss for the period ending September 30, 1973 of $222,085.49.

In holding that a §2 violation had been established, the Trial Court held that the jury could have reasonably found: that the "pak" was a collection of cosmetics, purchased as a unit; that it was uniquely designed for skiers; and that for the purpose of examining the competitive effects of appellants' actions, the ski market was the relevant market, being separate and distinct from the national cosmetic market. The Trial Court further found that since the evidence permitted a reasonable inference of a substantial restraint of trade that the jury could have found a dangerous probability of monopolization, *even absent specific proof of Bonne Bell's market power*. We respectfully disagree.

There are many statutes and regulations, both federal and state, touching the nervous system of our national competitive economic order. Courts must guard against impeding competitive rigors. The prime concern of the statutory framework and the role of the courts is not that of shackling competition, but rather that of prohibiting restraints thereon. Cale v. Hughes Tool Company, 215 F.2d 924 (10th Cir. 1954). The admonition of the Supreme Court as set forth in Apex Hosiery Co. v.

Leader, 310 U.S. 469 (1940), relating to the prohibitions of the Sherman Act is, we believe, worthy of note:

> Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.
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> 310 U.S. 469 at 500-501.

Thus our concern cannot involve the theoretical joust between regulation and competition, but rather whether the record before us on appeal dictates and justified the imposition of the controls and sanctions of the federal anti-trust statutes.

We have held that an aggrieved party alleging violations of the Clayton Act cannot rest on the proof of a wrong [unlawful merger] which does not demonstrate any direct connection with the injury he complains of and that proof of illicit acts, in the context of anti-trust violations looking to damages for injuries allegedly suffered, may not be sufficient to establish the nexus required. Reibert v. Atlantic Richfield Company, 471 F.2d 727 (10th Cir. 1973), cert. denied 411 U.S. 938 (1973). It is fundamental that one invoking the treble damage proviso of the Sherman Act must prove actual injury by reason of anti-trust infractions in order to recover. When dealing with the imposition of treble damages, liberality of proof is, at best, a most questionable quantum. In this respect we are well aware of the recent pronouncement of the Supreme Court on the burden of proof required to sustain an anti-trust judgment. In Zenith Radio Corporation v. Hazeltine Research, Inc., *supra*, the Court said:

Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent[9] by the Canadian pool's restraints upon imports of radios and television sets.

> [9]Zenith's burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality if shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under §4. Continental Ore Co. v. Union Carbide & Carbon Corp., supra, at 702 (1962); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 143-144 (1968) (concurring opinion).

395 U.S. 100 at 114.

Trial and appellate courts alike must also observe [beyond compliance and deference to Rule 52(a)] the practical limits of the *burden of proof* which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of the defendant's wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts

had caused damage to the plaintiffs." Bigelow v. R.K.O. Pictures, Inc., supra, at 264. See also Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-379 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-566 (1931). (Emphasis supplied).

395 U.S. 100, 123, 124.

And while it is well established that a fact-finder is not entitled to base a judgment on speculation or guesswork, the jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Eastman Kodak Company of New York v. Southern Photo Materials Company, 273 U.S. 359 (1927).

Zenith Corp., supra, followed Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946), wherein the Court noted:

> In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injury plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. In this we but followed a well-settled principle. See *Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 38-9. The tortious acts had in each case precluded ascertainment of the amount of damages more precisely, by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions. Nevertheless, we held that the jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible.

In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." *Story Parchment Co. v. Paterson Co., supra,* 561-4; *Eastman Kodak Co. v. Southern Photo Co., supra,* 377-9. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972, 979.

327 U.S. at p. 264, 265.

In handing down his post-trial rulings in the case at bar, it is clear that the learned and conscientious Trial Judge relied upon Denver Petroleum Corporation v. Shell Oil Company, 306 F.Supp. 289 (D. Colo. 1969):

While there is no need now to go into the specific deficiencies of the evidence in this regard, the applicable principles should be stated. The rule has long been established in antitrust cases that where the fact of damage caused by a defendant's wrong is established with certainty, the fact that such damage is uncertain as to amount is no obstacle to recovery and a just and reasonable estimate should be made. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied,* 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651 (1952). But it is equally true that "the amount of damages may not be based upon mere speculation and conjecture." Kobe, Inc. v. Dempsey Pump Co., *supra,* at 426 (citing *Story Parchment*). Especially pertinent is the decision in Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F.Supp. 440 (E.D. Pa. 1960). The court in that case was faced, as is the Court here, with the hypothetical profit calculation of a private antitrust plaintiff claiming standing under efforts to enter a business. After analyzing the profit calculation, in granting judgment for the defendant the court made the following statement in which we concur:

> [D]espite judicial liberality in accepting minimal proof of damage in an anti-trust case, the rule persists that any damage estimate * * * must be "just and reasonable" and not based on "speculation or guesswork". No damage verdict could be rendered upon the evidence in the present case without doing violence to this inexorable requirement. 184 F.Supp. at 448 (Citation omitted).

306 F.Supp. at 309.

Notwithstanding the liberal rules above discussed relating to the evidence requisite to establish a cause for anti-trust damage award, a necessary element of proof required to establish a prima facie case of violation of §2 of the Sherman Act is that of *specific intent to monopolize.* Swift & Company v. United States, 196 U.S. 375 (1905). See also United States v. Griffith, 334 U.S. 100 (1948).

The Supreme Court has not yet expressly held that there must also be proof of a "dangerous probability" of success (with an attendant market description and proof of market power of the defendant), or whether intent alone is enough with whatever description of the circumstances is thereby required. The decisions where the Supreme Court has reviewed *attempt claims* have been the subject of conflicting interpretations. United States v. Columbia Steel Co., et al., 334 U.S. 495 (1948); Lorain Journal Co. et al. v. United States, 342 U.S. 143 (1951).

The United States Courts of Appeal which have expressly considered the problem, with the possible exception of the Ninth Circuit, have concluded that proof of market power, or market position (with a definition of the relevant market) is necessary to establish a claim under §2 in addition to the proof of specific intent. The power must be shown to exist in the relevant market, and this power must create the "dangerous probability" referred to in *Swift, supra.* This is a "dangerous probability" of the power to control prices and to exclude competition. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), cert. denied ___ U.S. ___; Mullis v. ARCO Petroleum Corporation, 502 F.2d 290 (7th Cir. 1974); Morning Pioneer, Inc. v. Bismarck Tribune Company, 493 F.2d 383 (8th Cir. 1974), cert. denied 419 U.S. 836 (1975);

Panotex Pipe Line Company v. Phillips Petroleum Company, 457 F.2d 1279 (5th Cir. 1972), cert. denied 490 U.S. 845 (1972); Agrashell, Inc. v. Hammons Products Company, 479 F.2d 269 (8th Cir. 1972), cert. denied 414 U.S. 1022 (1973); Kearney & Trecker Corporation v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), cert. denied 405 U.S. 1066 (1972); Bernard Food Industries, Inc. v. Dietene Company, 415 F.2d 1279 (7th Cir. 1969), 397 U.S. 912 (1970); Volasco Products Company v. Lloyd A. Fry Roofing Company, 308 F.2d 383 (6th Cir. 1962), cert. denied 372 U.S. 907 (1963); McElhenney Co. v. Western Auto Supply Company, 269 F.2d 332 (4th Cir. 1959). As to the Ninth Circuit, the court took a contrary view in Lessig v. Tidewater Oil Company, 327 F.2d 459 (9th Cir. 1964), cert. denied 377 U.S. 993 (1964); *but see also* Hallmark Industry v. Reynolds Metals Company, 489 F.2d 8 (9th Cir. 1973), cert. denied 417 U.S. 932 (1974); and Bushie v. Stenocord Corporation, 460 F.2d 116 (9th Cir. 1972).

In Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., *supra*, the Court, in relating to a Sherman Act §2 market definition significantly observed:

> *A market definition which is confined to the seller's perspective is not meaningful . . . By necessity definition of "market" must also focus on attitudes and reactions of consumers.* (Emphasis supplied).
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> 508 F.2d 547 at 551.

Reference is made by the parties to the decision of this court in Union Carbide & Carbon Corporation v. Nisley, 300 F.2d 561 (10th Cir. 1961), appeal dismissed 371 U.S. 801 (1962). We there said of the trial court's instructions:

> We think the instructions in that regard correctly stated the law of the case, and we do not think it

> was reversibly erroneous to refuse to define "attempt to monopolize" beyond the point of telling the jury that the attempt must be accompanied by a specific intent to acquire market power and excludes others from competition.
>
> 300 F.2d 561 at 586.

That is to say that an "attempt" must be accompanied by a specific intent. This is much the same as the majority position among the Circuits. We, in *Union Carbide*, held that it was not error for the trial court to fail to define "attempt". The opinion's rule and cases cited in support thereof (i.e., that the jury must find from the greater weight of the evidence that the defendants agreed to restrain trade . . . or that they monopolized or attempted to monopolize, either in concert or individually; and that such unlawful conduct had an injurious impact on the plaintiff's business), held that if the instruction includes the essential elements a party cannot complain that it did not include particular language that he requested (i.e., conduct creating a dangerous probability of monopolization). It is apparent that the decision held that the elements requested by appellant, but in another form, were included in the Court's instructions.

The case at bar was tried on the theory that "dangerous probability" or "reasonable probability" was an element or ingredient in the case. The appellee urges that the appellants did not object to its inclusion in the pretrial order, nor was an objection made to the giving of an instruction on the point. Thus, the parties and the Court all considered that it was a necessary element.

Since the "dangerous probability" is that of attaining a successful control of prices in the market, and the power to thus exclude competition therefrom, an evaluation of this probability by the jury necessarily requires that it

have the facts as to the *market being considered, and the power of the defendant in it.* The record, as to this element, shows only that there were at the time some five million skiers in the country who were affluent and youthful; that the market was sought after, and that there were unique marketing problems. This was all that was shown as to the market as such. There was no evidence offered as to the corporate defendant's sales volume in the "skier's cosmetic market" nor the sales volume therein of anyone else. *There was no evidence as to the total sales in the market.* There was no evidence as to the corporate defendant's power as to pricing or as to any other party's power. While it was shown that the defendant corporation had an exclusive endorsement agreement with the USST, this does not prove anything about the cosmetic market among skiers, nor does any dollar amount the corporation may have paid under the contract. The contract does not prove "economic power" in the "market" per se, and it is a valid agreement. And while there is testimony that Bonne Belle, Inc. sought a *hold* on the market there is no evidence in the record that any firm had a hold *on* the market. The assertion that plaintiff was excluded from the market refers to the sale of paks only. This, however, was not the "market" used by the trial court, nor in fact by the parties in the final analysis. There was no pak market. The alleged illegal acts of the defendants were related solely to such packaging for Ski Team endorsement.

The critical problem here does not involve a question of proof of damage made at trial or how the damages may be proved. Rather, it is a basic matter of proof of a cause of action, or, more particularly, proof of a prima facie case to go to the jury. Thus, in the absence of any showing by the plaintiff as to where the area of

competition existed, or what clout the defendant corporation had therein, it was error for the trial judge to submit the §2 issue to the jury. No facts were before it upon which to base a verdict, and no facts from which inferences could properly be drawn.

The only established facts were: that Bonne Bell had the economic power to become the official cosmetic of the U.S. Ski Team; that it had the economic power to pay the USSA over $180,000.00 in minimum retainers during the initial five-year period of its exclusive endorsement contract; that it believed that it had the economic power to develop a "hold" on the skiers' cosmetic market in the United States; that it undertook a "total involvement" in the skiers' cosmetic market in 1966 when it then commenced a specific skiers' oriented advertisement campaign. However, Delaney Corporation did not present any evidence of Bonne Bell's share in the skiers' market in a percentage sense or otherwise. We hold, accordingly, that while the record does establish that plaintiff Delaney Corporation incurred some sales and distribution losses, it failed to delineate the relevant market in question and the power of Bonne Bell in that market. Thus, there are no specific or actual facts in this record developed by Delaney Corporation to Bonne Bell's position in the market. This fatal defect did not provide the jury with the proper standard of the relevant market and the parties' positions therein to measure damages, without undue speculation and the necessity of drawing inferences from inferences.

III.

Bonne Bell contends that the Court improperly instructed the jury on the relevant market. Bonne Bell alleges that the instruction on relevant market was

erroneous because it failed to inform the jury "that the outer limits of that market are established by products which are reasonably interchangeable and competitive with the products in question here."

The Court instructed the jury on relevant market as follows:

> As you have been instructed, to find that Defendants attempted to monopolize, you must find that they specifically intended to exclude Plaintiffs from competition in the relevant market. And I will not direct your attention to the phrase, "relevant market".
>
> An allegation of attempt to monopolize has meaning only in connection with a relevant market; that is, it is not sufficient that the Defendants have attempted to monopolize generally, rather the Defendant must have attempted to monopolize some particular segment of trade. The Plaintiffs claim that sales to skiers throughout the United States of cosmetics, health and toilet items and/or kits containing such items constitutes the relevant market in this case.
>
> To find for the Plaintiffs on the attempts to monopolize, you must conclude from the evidence that such a distinct relevant market does in fact exist. There are two important parts of the term "relevant market". One is relevant product market, the other is relevant geographic market. Consequently, to find for the Plaintiffs, you must find that sales to skiers of cosmetic, health and toilet items and/or kits containing such items constitutes a separate and distinct product market, and that the entire United States constitutes the geographic market in which the Plaintiffs intended to compete with the Defendants.

We hold that the Court's instruction adequately advised and guided the jury on the issue of the relevant cosmetics market notwithstanding the reference to "cosmetics, health and toilet items" without restriction to Bonne Bell's cosmetic products or the products within the "pak". The instruction included *all* cosmetics, health and toilet items, and, as such, included products which are "reasonably interchangeable and competitive with the products in question." United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1955); Cole v. Hughes Tool Company, *supra*.

The Trial Court did not make any finding of fact. Following trial, the Court commented only on that which the Court believed the jury concluded and that which the Court believed the jury could properly have relied upon in support of the general verdict.

We hold that in light of an absence of substantial evidence of the relevant market in question, and of Bonne Bell's requisite economic power therein, there were no issues presented for jury determination relating to the alleged § 2 Sherman Act violation.

In view of the fact that the verdict was general, there is no means available to determine which theory of liability, i.e., violation of Section 1 or Section 2 of the Sherman Act the jury based the general verdict upon.

For the reasons discussed above we reverse and remand for new trial consistent with the views expressed herein.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM – NOVEMBER 11, 1975

Before The Honorable Oliver Seth, The Honorable Robert H. McWilliams, and The Honorable James E. Barrett, Circuit Judges

E. J. DELANEY CORPORATION and SKI KIT, INC.,	)	
Plaintiffs-Appellees,	)	
vs.	)	No. 74-1751
	)	(D.C. No. C-3755)
BONNE BELL, INC., JESS A. BELL,	)	
Defendants-Appellants,	)	
PAUL PARKER and CHARLES T. GIBSON,	)	
Defendants.	)	

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Colorado for a new trial in accordance with the opinion of this Court.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action C-3755

E. J. DELANEY CORPORATION and SKI KIT, INC.,
PLAINTIFFS,
v.

BONNE BELL, INC., CHARLES T. GIBSON, JESS A. BELL and PAUL PARKER,
DEFENDANTS.

* * *

OPINION AND ORDER

ARRAJ, Chief Judge

This action is to recover treble damages under section 4 of the Clayton Act (15 U.S.C. §15) for defendant's alleged violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2). The case was tried to a jury, resulting in a verdict for plaintiff in the sum of $159,063.50. The matter is now before us on the following post-trial motions: (1) defendant moves for judgment n.o.v. or, in the alternative, for a new trial; (2) defendant also moves for the court to determine the value of, and deduct from the judgment against them, any consideration given the plaintiff by two other defendants against whom this suit was dismissed prior to the jury verdict; and (3) plaintiff moves for assessment of reasonable attorney's fees. A brief summary of the evidence presented at trial follows.

In late 1963, defendant Bonne Bell, Inc. contracted with the United States Ski Educational Foundation [hereinafter referred to as USSEF], by which defendant was guaranteed the exclusive endorsement of the United States Ski Team for Bonne Bell's cosmetic and beauty aid products. The agreement covered the years 1969 through 1973, inclusive. It appears that during this period, defendant used the endorsement in a number of marketing efforts, including the distribution of a sample pak of cosmetics and beauty aids to skiers.

In 1970, plaintiff E. J. Delaney Corporation developed a "Skier's Holiday Pak," containing health and toiletry items. The products of several corporations in the toiletry industry were contained in this promotional pak, and there was some overlap between these products and those included in the Bonne Bell pak. In late 1970 plaintiff presented its pak to Mr. Paul Parker, who was then fund-raising chairman of the United States Ski Association. Delaney proposed that the pak be used to raise funds for the U.S. Ski Team and, at the same time, promote the products contained therein. Trustees of USSEF initially approved the plan, but ultimately rejected it and alternative plans proposed by Delaney. The plaintiff's promotional effort in the "ski market" thereafter resulted in a dismal failure.

There is also in evidence certain communications between defendant Jess Bell, president of Bonne Bell, Inc., and agents of USSEF concerning Bonne Bell's contractual rights under the endorsement agreement and the effect of the Delaney proposals. Plaintiff contends that these communications and surrounding circumstances resulted in USSEF's rejection of the Delaney proposals, and that such actions constituted a combination or conspiracy in restraint of trade, prohibited by

section 1 of the Sherman Act. Plaintiff further contends that defendant attempted to monopolize the sale and distribution of cosmetics and beauty aids in the "ski market" in violation of section 2 of the Act. These alleged violations, the plaintiff argues, proximately caused substantial injury to its business and property interests.

Defendants deny that they participated in any combination or conspiracy or that they attempted to monopolize any relevant market in interstate commerce. They contend that their acts and decisions were motivated solely by the desire to protect their legitimate contractual rights under the exclusive endorsement agreement. Defendants offer many arguments in support of their motions, which arguments are discussed below.

The substance of and distinction between the section 1 and section 2 theories of liability should first be noted. Section 1 states in relevant part that:

> Every contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal (15 U.S.C. § 1)

Section 2 makes illegal the monopolization, attempted monopolization, or conspiracy for monopolization of "*. . . any part* of the trade or commerce among the several States." (15 U.S.C. §2) (emphasis added). The purpose of the sections, taken together, is to prohibit monopolization and lesser forms of anti-competitive behavior, which unreasonably restrain commerce. This includes the destruction or substantial suppression of competition. [*Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1 (1911)] Section 1 is directed at the *means* of such restraint, making the "contract, combination, . . . or conspiracy" itself illegal. Section 2 is aimed at the *ends* of anticompetitive behavior, outlawing both

the attempted and the realized monopoly. [*See, Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F. Supp. 945 (S.D. Tex. 1972)] With this background, we now turn to the specific motions of the parties.

I. *Defendant's Motion for Judgment Non Obstante Verdicto*

The standard for deciding this motion was reviewed by Judge Doyle in *Ahrens v. American-Canadian Beaver Co.*, 458 F.2d 607 (10th Cir. 1972):

> [T]he trial court should grant a judgment n.o.v. only in the clearest of cases. The court is bound to consider the evidence in a light most favorable to the party against whom the motion is directed. . . . [T]he evidence must be overwhelmingly in favor of the party in whose favor the trial court enters [a judgment n.o.v.] (*Id.* at 611)

Defendant's motion may therefore be granted only if we find that, as a matter of law, no jury of reasonable and rational human beings could have reached the verdict now under attack. [*See also, Derr v. Safeway Stores, Inc.*, 404 F.2d 634 (10th Cir. 1968)]

A. *The "Relevant Market"*

Both theories of liability in this case are contextual, in that they depend upon the intent, purpose, means, and results of the defendant's acts regarding some given segment of commerce.

Defendant suggests that, as a matter of law, the only market relevant to this case is the general, national cosmetics and toiletry market, and that no "ski market" or submarket could have reasonably been found by the jury. This argument is without merit. For either theory of liability, it is not necessary that the alleged anti-

competitive behavior of the defendant affect the largest or most expansive market in which the subject goods are sold. [*See United States v. National City Lines, Inc.*, 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951)]. The Supreme Court in *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934) declared:

> The provisions of §1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to *any part of the classes of things forming a part of interstate commerce.* (*Id.* at 279) (emphasis added)

The test of the relevant market concept was stated by the Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962):

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (*Id.* at 325)

Interchangeability is not dependent merely upon the physical attributes of the product. Access to the product, respecting both price and geography, and any "peculiar characteristics" which limit the number of potential, functional substitutes also determine interchangeability. It is thus the access, use, price, quality, and nature of the product which must be examined to evaluate consumer alternatives. Consumer alternatives, in turn, do not depend upon abstract or theoretical conceptions of either defendant or plaintiff; rather, they depend upon the jury's notion of *consumer perceptions.*

The jury could have reasonably found that Bonne Bell's ski pak was a *collection* of cosmetics, that the collection, purchased *as a unit*, was a distinct "product" from the component goods comprising the pak; that the pak was more or less uniquely designed for use by skiers; that access to the pak, in either or both price and geography, was limited to skiing areas; and that use and consumer perceptions of the pak distinguish it from the general product offerings in cosmetics. Such findings permit the inference that the "ski market" was separate and distinct from the national cosmetics market, at least for purposes of examining the competitive effects of defendant's acts. [*See International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959); *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969)]

B. *The Section 1 Theory of Liability*

Defendant contends that the evidence cannot support any inference of their participation in a conspiracy in restraint of trade. Specifically, they argue (1) that their exclusive endorsement agreement with USSEF was lawful; (2) that their communications to USSEF's agents that they would enforce their rights under this contract were not conspiratorial; and (3) that acts of the alleged conspirators were in furtherance of their own, independent business interests, and not to prevent or inhibit the plaintiff's entry into the relevant market.

"Conspiracy," under the Sherman Act, has been defined as a:

> . . . joint undertaking extending over a period of time with a common purpose, intent or design resulting from a combination or an agreement, express or implied, to accomplish an unlawful end

> or to accomplish a lawful end by an unlawful means. [*Pearl Brewing Co. v. Anheuser-Busch, Inc., supra* at 950]

In short, conspiracy requires some *interdependence* of decision-making or acts which have as their purpose the unreasonable restraint of trade. This interdependence may be proven by the "course of dealing or other circumstances" as well as by direct evidence of verbal agreement. [*United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920)] Similarly, the finding of a "joint undertaking with a common purpose" may be inferred from circumstances and coincidences of the alleged conspirators' acts and decisions. [*United States v. American Oil Co.*, 291 F. Supp. (D.N.J. 1968)] Finally, the term "unreasonable restraint" embraces not only the destruction of existing competition, but also the inhibition of prospective competition. [*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)]

It appears to us that defendants, in their Memorandum of Law, misapply these principles. Although the endorsement agreement between the defendant and USSEF is not a *per se* violation of section 1, it is not unreasonable for the jury to view the sequence of events from late 1970 until the spring of 1971 as evidence of an on-going conspiracy. Judge Frankel in *United States v. Chas. Pfizer & Co.*, 281 F. Supp. 837 (S.D.N.Y. 1968), *rev'd on other grounds*, 426 F.2d 32 (2d Cir. 1970), *aff'd*, 404 U.S. 548 (1972), analyzed the issue as follows:

> It is fundamental that 'acts absolutely lawful in themselves may be steps in a criminal conspiracy.' 'Wholly innocent acts' may be 'part of the sum of acts' which make up the conspiracy. (*Id.* at 850)

Communications between the defendants and agents of USSEF, the coincidences in timing and effect of appar-

ently unilateral acts by the parties, and the surrounding circumstances of the course of dealing all point to a reasonable interence of interdependence of decision and purpose. The defendant's assertion of its admittedly valid contractual rights did not occur in a vacuum, but rather in the specific context of Delaney's proposals to USSEF. The jury might well have found that Bonne Bell, in concert with agents of USSEF, acted *to extend the operation* of the endorsement agreement beyond its legitimate effects. Such actions may have resulted in a conspiracy to suppress competition, an outsome fundamentally different than the mere presentation of Bonne Bell's rights.

Section 1 of the Sherman Act prohibits more than conspiracies, as they were technically defined at common law. Although the terms "combination" and "conspiracy" are frequently used synonymously in section 1 cases, there is a definitional difference emerging in the case law. In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Supreme Court recognized that a *combination* could be comprised of a *single unilateral act* by one party in dealing with another, wherein the latter concurs, expressly or impliedly, in the acts of the former with knowledge of their *intended effects*. It was quite reasonable for the jury to conclude (1) that Bonne Bell used their exclusive endorsement contract and other means with the intended effect of keeping Delaney out of the relevant market; and (2) that agents of USSEF understood and acquiesced in that purpose. Such conclusions permit the ultimate finding of a *combination* to suppress competition.

Finally, defendants emphasize that all the evidence adduced at trial has a non-conspiratorial explanation. In no precedent cited by defendants or discovered by the

court's own research has the possibility of innocent motive prevented the inference of conspiracy, where such inference was otherwise reasonable. As the court stated in *Chas. Pfizer, supra:*

> That a particular action is consistent with lawful business behavior does not mean that it, along with evidence of other actions similarily consistent with lawful business behavior, may not support an inference of conspiracy. (*Id.* at 850)

Defendants cite, among others, the decision in *Blue Bell Co. v. Frontier Refinery Co.*, 213 F.2d 354 (10th Cir. 1954) for the proposition that a legitimate business justification for the allegedly conspiratorial conduct is, *as a matter of law*, an absolute defense to a section 1 suit. The opinion contains the following language:

> The underlying purpose and effect of the exchange agreements are too plain for doubt. In the first place, they were obviously entered into in order to *facilitate* competition, not to stifle it.
>
> . . . .
>
> There is *no* evidence in this case of the exercise of leverage of contracts . . . as a means of controlling prices and suppressing competition. (Id. at 359, 360) (emphasis added)

In contrast to *Blue Bell*, the conduct and decisions of the defendants and agents of USSEF present coincidences which do not have but one reasonable interpretation. Defendants contend that, "the evidence, even taken most favorably to Delaney, did not show that conspiracy was a more probable explanation for" the sequence of events. Even if conspiracy were a somewhat less probable explanation, the jury's finding in this case would not be so irrational as to require a judgment n.o.v. It therefore appears that the finding of conspiracy and/or combina-

tion in restraint of trade and suppression of evidence was not unreasonable.

C. *The Section 2 (Attempt to Monopolize) Theory of Liability*

Specific intent to monopolize must be present to hold the defendant liable under this theory. [*Bank of Utah v. Commercial Security Bank*, 369 F.2d 19 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967)] The finding of specific intent and all other requisite elements of this alleged violation depend upon our earlier conclusions regarding the "relevant market."

If the *only* relevant market were the national cosmetics market, then the evidence adduced at trial might well be insufficient to support an inference of a specific intent to monopolize. Control over segments of the relevant market, even accompanied by prevention of distribution in defined geographical portions of an expensive national market could not, as a matter of law, constitute an attempt to monopolize. [*American Football League v. National Fotball League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963)]. But in this case there is an adequate basis for the jury's conclusion that the relevant market was the ski market, and that the defendants did specifically intend to monopolize this market.

This is not, however, the end of the inquiry. To establish any section 2 violation, including an attempt to monopolize, there must be some proof of the defendant's *power* to monopolize. [*Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972)]. The Supreme Court in *Swift & Co. v. United States* 196 U.S. 375 (1905) held:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. (*Id.* at 396)

There is no dangerous probability of monopolization where the defendant could not have attained some unlawfully dominant position in the market even if his attempted acts had been successful. Stated differently, if the attempted market position is achieved and is not violative of antitrust law, certainly the attempt to gain that position cannot be unlawful. [*Diamond International Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968)]. This element of the section 2 theory could have been proven by evidence of Bonne Bell's potential impact upon or actual control of the ski market. There was little, if any, evidence of the defendant's capacity to achieve or maintain a monopoly in that market. The deficiency of such evidence is not, however, fatal to the jury's finding of a dangerous probability of monopolization. As the court held in *Dobbins v. Kawasaki Motors Corp., U.S.A.*, 362 F. Supp. 54 (D. Ore. 1973):

> [W]here a plaintiff has not established a substantial claim of restraint of trade, he must prove dangerous probability of success through sufficient market power. On the other hand, when a plaintiff can establish a substantial claim of restraint of trade, that evidence itself demonstrates a specific intent to monopolize so overwhelmingly so as to itself be proof of a dangerous probability of success. (*Id.* at 60)

Since the evidence permitted a reasonable inference of a substantial restraint of trade, the jury could also have reasonably found a dangerous probability of monopolization, even absent specific proof of Bonne Bell's market

power. A jury's concusion that defendants attempted to monopolize the ski market would, therefore, not be irrational.

D. *Proof of Causation and the Fact of Damage*

At least one of Delaney's proposals to USSEF involved representations to prospective consumers that net proceeds from the sales of the ski paks would go to the U.S. ski team. Defendant contends that such a "charitable subscription" scheme was illegal under some local, state, and federal laws, and therefore, plaintiff could not have suffered damage to a *legal* business or property interest. Proof of damage to a business or property interest is necessary in a private antitrust case, pursuant to section 4 of the Clayton Act (15 U.S.C. §15). [*See, Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36 (10th Cir. 1971)]. Even if it were true that this particular form of marketing would have been illegal, there is ample evidence of other proposals made by plaintiff to USSEF, which proposals were legitimate, and which the jury could reasonably have concluded were undermined by the anti-competitive behavior of the defendants. Additionally, the "charitable subscription" proposal was not *itself* illegal in most, if not all, jurisdictions within the relevant market. Certain methods of solicitation and the failure to register or obtain proper licensing might have resulted in Delaney's liability, but such potential violations were at most collateral to the presumptively lawful distribution of goods in interstate commerce. Moreover, the fact that some adjustments in the final marketing plan might have been necessitated by local law does not insulate the defendant from antitrust liability. [*Mason City Tent & Awning Co. v. Clapper*, 144 F. Supp. 754 (W.D. Mo. 1956)]

Defendants further argue that plaintiff did not possess a sufficient "business or property interest" because they lacked the "intent" and "preparedness" to enter the relevant market. Cases cited in support of this argument involve, without exception, plaintiffs who could not have competed in the relevant market even if the defendant had not committed an antitrust violation. Entry into the market for each of these plaintiffs was either *per se* impossible or so highly unlikely that their "business interest" was merely an illusion. [*See, e.g., Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289 (D. Colo. 1969)] But in the present case there is ample evidence of plaintiff's "preparedness" to compete in the ski market. Indeed, the jury might well have concluded that any inability of Delaney to begin immediate distribution was a by-product of defendant's conduct, and not caused by some other, unrelated condition. There is clear evidence of plaintiff's genuine intention to enter the market. It had expended substantial amounts of time, effort, and money on the marketing plan and actual product. It was also not unreasonable for the jury to find that plaintiff possessed sufficient skill and resources to launch a business which was more than a pipe dream. [*See, Peller v. International Boxing Club*, 227 F.2d 593 (7th Cir. 1955)]

Having determined that plaintiff did possess a "business or property interest," within the meaning of section 4 of the Clayton Act, the jury was next faced with the question of causation. One of the more definitive statements of proximate cause in private antitrust suits appears in *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971):

> There must be a causal connection between an antitrust violation and an injury sufficient for the

> trier of fact to establish that the violation was *a* 'material cause' of or *a* 'substantial factor' in the occurrance of damage. . . . And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the [antitrust laws were] clearly intended to protect. (*Id.* at 187) (emphasis added)

The evidence is more than adequate to establish the defendant's conduct as *one* material cause or substantial factor leading to plaintiff's damage. The "specific form of illegal act," whether the conspiracy itself or the attempted monopolization it produced, is directly linked to the nature of harm suffered. Plaintiff's prospective business is clearly the sort of "legitimate activities" which the antitrust laws were intended to protect. It appears, therefore, that the jury's finding of both the fact of damage and causation were reasonable.

E. *Proof of the Items and Amount of Damage*

Defendants' last contentions are that the evidence is insufficient to support the damages awarded by the jury. This court held in *Denver Petroleum Corp. v. Shell Oil Co., supra,* that:

> The rule has long been established in antitrust cases that where the fact of damage caused by a defendant's wrong is established with certainty, the fact that such damage is uncertain as to amount is no obstacle to recovery and a just and reasonable estimate should be made. . . . But it is equally true that "the amount of damages may not be based upon mere speculation and conjecture." (*Id.* at 309)

As we have already observed, there was adequate evidence for the jury to find the fact of damage with certainty. Defendants would have us demand a degree of

specificity in the proof of the amount of damages which is simply not required in antitrust cases. The risk of any uncertainty in amount must be borne by the antitrust violator. [*Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)] The jury need only make a reasonable estimate of which items of alleged damage were proximately caused by the defendant's conduct. The court did exclude all items of loss profit, but this was the only category of damage for which the evidence was legally insufficient. As to the other categories, there may have been some deficiencies in the precision of plaintiff's proof, but nothing so significant as to require the jury to speculate. Their estimate appears just and reasonable.

Finally, defendant suggests that only damages incurred up to the date of filing suit may be recovered. Such a limitation applies where both the anticompetitive acts and their effects continue beyond the date of filing, as where the antitrust violation is itself continuous in nature. But where, as in the present case, the violation is complete, and only its effects persist, damages for all injury, otherwise provable, may be recovered. [*Compare, Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied,* 343 U.S. 942 (1952) *with, Frey & Son v. Cudahy Packing Co.*, 243 F. 205 (D. Md. 1917)]

It appears from the foregoing discussion that the jury's findings of liability and damages were not unreasonable, and defendant's motion for a judgment *non obstante verdicto* must, therefore, be denied.

II. *Defendant's Motion for a New Trial*

The vast majority of defendant's arguments in support of this motion are directed at supposed errors in the court's instructions to the jury. After reviewing the

transcript of these instructions, we are convinced that they are entirely adequate. They state the governing principles of law as explicated in our earlier discussion of defendant's motion for judgment n.o.v.

There is one claim of error which is not answered by our previous remarks: The court instructed the jury: "[A] person cannot conspire with himself, nor can an officer of a corporation conspire with his corporation; consequently, you are instructed that there can be no conspiracy between the defendant Jess Bell and the defendant Bonne Bell, Inc." Defendants maintain that the instruction should have specifically excluded all other combinations of "persons" between or among whom a conspiracy was legally impossible. The evidence, however, did not reasonably suggest any other combination for which such an exclusionary instruction was required. The court's instructions need not insure against *all* unreasonable inferences which a jury might theoretically draw. Such is not legally required or practicably possible.

Consequently, defendant's motion for a new trial must also be denied.

III. *Defendant's Motion to Determine Value and Deduct from Judgment*

This litigation was originally brought against four defendants, Bonne Bell, Inc., Jess Bell, and two representatives of the ski associations—Charles T. Gibson and Paul Parker. Before the case was submitted to the jury, plaintiff stipulated that the action as to Gibson and Parker be dismissed with prejudice. The court entered orders of dismissal for both defendants. The remaining defendants, Bonne Bell, Inc. and Jess Bell, now move that we determine the value of, and deduct from the judgment against them, any "settlement amount" received by

plaintiff from Gibson and Parker in consideration for the stipulation to dismiss.

There is sufficient authority for granting such an offset. [*See, e.g., Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10th Cir. 1972)]. The deduction is to be made from the trebled amount of the verdict, and not from the actual damages awarded by the jury. [*Flintkote Co. v. Lysfjord,* 246 F.2d 368, 397-98 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957)]

The only question remaining is the amount of the deduction. There is uncontroverted evidence that Gibson and Parker each gave plaintiff $100 in cash. Additionally, Gibson provided plaintiff with a letter retracting certain statements made by Gibson, which impugned the integrity of plaintiff's president, Edward J. Delaney. There was no evidence presented as to the intrinsic value of this letter. It appears that it has no positive value as such. Unlike cash it cannot be committed to a multitude of uses; nor can it be converted to cash in some identifiable market. By its very nature, the letter has value only to the plaintiff and its president. Its only conceivable use is to neutralize the adverse effects of statements and events surrounding the abortive negotiations between plaintiff and USSEF. Since the letter was not written until May 20, 1974, when the trial was already in progress, it could have no effect upon the damages included in the jury's verdict. For these reasons, we believe the letter's intrinsic value is, at most, nominal. We therefore value it at $100. This, in addition to the cash settlement, results in a total deduction from the judgment of $300.

IV. *Plaintiff's Motion to Determine Reasonable Attorney's Fee*

The successful plaintiff in a private antitrust suit is entitled to a "reasonable attorney's fee" as part of the judgment in his favor. (Clayton Act §4, 15 U.S.C. §15) In an unbroken line of precedent beginning with *Montague & Co. v. Lowry*, 193 U.S. 38 (1904), it has been held that the amount of such fee is within the discretion of the trial court. Since *Montague*, courts have announced several factors which are to guide the trial judge in fixing the amount of such fee. These include:

(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

(2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,

(3) time and labor spent,

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff.

[*See, e.g., Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 480 (S.D.N.Y. 1970)]

At the hearing on this matter, sufficient oral testimony and exhibits were offered to permit a fair valuation of counsel's services. Considering this evidence and arguments of counsel for all parties in light of the factors just

enumerated, we find that a "reasonable attorney's fee" in this case is $48,850.00.

Trebling the jury's verdict of $159,063.50, subtracting the $300 plaintiff received from the alleged co-conspirators, and adding the $48,850.00 attorney's fee brings the total recovery to $525,740.50. It is therefore

ORDERED AS FOLLOWS:

(1) That the defendant's motion for judgment n.o.v. be and the same hereby is denied;

(2) That the defendant's motion, in the alternative, for a new trial be and the same hereby is denied;

(3) That the defendant's motion for determination of value and deduction from judgment be and the same hereby is granted to the extent as above set out;

(4) That the plaintiff's motion for determination and assessment of a reasonable attorney's fee be and the same hereby is granted in the amount above set out; and

(5) That the plaintiffs have judgment against the defendants Bonne Bell, Inc. and Jess A. Bell in the amount of $525,740.50 plus costs to be taxed upon the filing of a bill of costs with the Clerk of this Court.

DATED at Denver, Colorado, this 20th day of September, 1974.

BY THE COURT:

/s/Alfred A. Arraj
ALFRED A. ARRAJ, Chief Judge
United States District Court

Supreme Court, U. S.
FILED
MAR 8 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-1127

E. J. DELANEY CORPORATION and
SKI KIT, INC.,
Petitioners,

vs.

BONNE BELL, INC. and JESS BELL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Petitioners App. 1a-23a) is reported at 525 F.2d 296. The opinion of the United States District Court for the District of Colorado denying respondents' motion for judgment notwithstanding the verdict and new trial (Petitioners App. 25a-43a) is not officially reported but is printed at 1975-2 CCH Trade Cases Para. 60,419.

JURISDICTION

The Judgment of the court of appeals (Petitioners App. 24a) was entered on November 11, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Is evidence of a relevant market and of economic power in that market necessary to prove an offense of "attempt to monopolize" under Section 2 of the Sherman Act?

STATEMENT OF FACTS

E. J. Delaney Corporation ("Delaney")[1] was organized by Edward J. Delaney in 1964 to provide advertising services in ski resort areas. The company advertised by means of a "weather station"—an outdoor formica panel showing wind direction, wind velocity, and temperature as well as advertising copy. By 1970, approximately 60 of these weather stations were being operated on the ski slopes and outside ski resorts.

Ancillary to the operations of the weather stations, Delaney's service personnel distributed free samples of a client's products to ski shops located in the vicinity of the weather station. In mid-1970, the company entered into a contract with Chase Bag to manufacture approximately 600,000 plastic bags to hold samples. Delaney solicited various manufacturers with offers to distribute samples of

1. "Delaney" refers to E. J. Delaney Corporation and Edward J. Delaney interchangeably except as otherwise indicated herein.

their products. During 1970 and 1971, Delaney made contractual commitments to 15 manufacturers. Typical of these commitments was an agreement with Ban deodorant to distribute 300,000 samples. For this effort, Delaney received $9,000.

Unfortunately, Delaney had devised no means of distributing sample packs. In late 1969 Delaney sought to interest the National Ski Area Association (NSAA), a trade association of owners and operators of ski resorts, in the company's sample pack idea in order to solve the critical distribution problem. By the end of September of 1970, the inventory of sample packs was accumulating and still Delaney had not received any word from NSAA.

Seemingly frustrated in one direction, in late 1970, Delaney approached Mr. Parker, the fund-raising chairman of the United States Ski Association (USSA). The USSA and the United States Ski Educational Foundation (USSEF), the fund-raising arm of the USSA, sponsored the U. S. Ski Team in international competition. Delaney initially proposed that the USSA begin a fund-raising drive by having the individual members of the association sell the sample packs for one dollar. Forty percent of the proceeds would go to the U. S. Ski Team and sixty percent to Delaney.

Bonne Bell, Inc. is engaged in the business of manufacturing and selling cosmetics, toiletries and beauty aids throughout the United States. Bonne Bell had sales of approximately $17 million in 1970. The total sales of cosmetics and toiletries in the United States is estimated to be in excess of $1.5 billion. Bonne Bell is, and was, a small factor in this market.

As part of an effort to promote its products, Bonne Bell in 1969 entered into a contract with the USSA which

subsequently was assigned to USSEF, the non-profit, fund-raising entity of the USSA. This agreement, in part, provided that "Bonne Bell shall have the exclusive right to utilize the Ski Team Endorsement on and in connection with cosmetic products and beauty aids;" that "Ski Team Endorsement" means "the right to use the name and logo of the U. S. Ski Team;" and that the USSA and the USSEF "will cooperate with Bonne Bell in its efforts to promote the sale and acceptance of its products." Between 1969 and 1973 Bonne Bell paid the USSEF approximately $182,000 under the terms of this agreement.

At the December 6, 1970 meeting of the USSA, the fund-raising chairman presented a verbal report of his discussions with Delaney. During the discussion one of the directors suggested that Bonne Bell be contacted "since it was a licensee" to see whether it had any objections to Delaney's promotion. The directors, after giving conditional approval, instructed the executive director of the USSA to check the Delaney plan with the association's auditors and the International Merchandising Corporation, a concern which supervises the Ski Team's endorsement of various products.

When Jess Bell, president of Bonne Bell, Inc., was contacted he stated that he was not opposed to the sale of sample packs by USSA members as long as those packs contained no items which competed directly with Bonne Bell. He stated that he was opposed to the promotion of any sample pack containing such competitive products by the USSA under circumstances suggesting an endorsement by the USSA or the U. S. Ski Team. Since the Delaney sample pack contained products which were in direct competition with those manufactured and sold by Bonne Bell, Jess Bell opposed Delaney's promotion scheme as initially presented to the USSA. On December 9, 1970, Parker informed Delaney that Bonne Bell objected.

Subsequently, on December 14, 1970, Edward J. Delaney contacted Bonne Bell personnel seeking to persuade them to alter their decision. As a result of this meeting, Delaney was informed by letter that Bonne Bell "would not oppose your plan if the gift sack did not contain any cosmetic or toiletry items. The other alternative would be that you market a gift set containing any items but with no reference to the U. S. Ski Team or the U. S. Ski Association." (Exhibit 39).

On December 15, 1970, Edward J. Delaney met with Parker to see if the program could be approved on a different basis; i.e. without the use of the Ski Team logo or official endorsement. On this new basis Delaney indicated that the percentage that the U. S. Ski Team would receive would be only 25 percent—as opposed to the original 40 percent. Ultimately, Delaney advanced a sliding scale under the terms of which the Ski Team would receive as little as 5 percent if less than 100,000 packs were sold.

Delaney knew on December 15, 1970, that the USSA was unwilling to proceed with its proposal as initially presented. By then, however, approximately 200,000 packs had been filled and were ready for distribution. Delaney still did not have any means of distributing the merchandise. Delaney was, therefore, in the uncomfortable position of having received $67,000 from suppliers with a mounting inventory of hundreds of thousands of samples and no means to fulfill its contractual commitments.

In an attempt to salvage its program with the USSA Delaney reworked the promotional material and eliminated the Ski Team logo. The redesigned mailer, however (Exhibit 52), specifically stated that the proceeds of pack sales were going to the U. S. Ski Team and strongly implied the endorsement of the U. S. Ski Team. In patri-

otic colors of red, white and blue, complete with stars and stripes, the Delaney mailer proclaimed:

RUSSIANS SUPPORT THEIR SKI TEAM.

WHAT ARE YOU DOING FOR OUR U. S. SKI TEAM?

EXPRESS YOURSELF.

ORDER A SKIERS' HOLIDAY PACK.

NET PROCEEDS DONATED TO THE U. S. SKI TEAM.

U. S. NEEDS YOUR HELP.

On January 10, 1971, approximately 70,000 of these mailers were circulated and eventually over 100,000 were distributed. When this unauthorized mailing came to the attention of a representative of USSA, he stated his firm objection to Delaney. While the mailer purported to be a fund-raising venture for the U. S. Ski Team, no such arrangement had been authorized.

Charles Gibson, President of the USSA and USSEF, called Delaney and demanded that he stop the dissemination of the unauthorized mailers. Gibson also sent a letter to the Ski Industry of America (ski shops), the Ski Area Association, the National Ski Patrol System, the directors of the Association, the Ski Team committee and various ski magazines. In part, the letter stated that the promotion was not authorized and "its perpetuation could conceivably constitute fraud on the public." The letter further stated that "in fact, only about 5 percent of the selling price will eventually go to the Ski Team. An individual, therefore, thinking that his $1.00 for a 'Skier's Holiday Pack' is a contribution may be misled, since most of the $1.00 goes to the promoter." Of the

$12,976.07 net proceeds received by Delaney and attributed to the mailer, the USSA received only $378.00.

In early March, 1971, Delaney learned that there would be a meeting of the USSA's board of directors in Denver. He called Gibson and demanded an opportunity to present his program. The USSA acceded to his demand. Before Delaney's presentation, Gibson briefed the board on the background including his personal view that Delaney's proposal was in conflict with the Bonne Bell contract. Further, Gibson stated that the net proceeds to the Ski Team would be negligible and that he personally did not wish to do business with Delaney.

In Delaney's presentation to the USSA a new program was presented under which the income would be derived from sales of the gift pack to the USSA *ski clubs*. The scheme of selling to *individuals* via mailers was not mentioned. Now the ski clubs would be urged to buy in large quantities and to pay in 30 days with credit for unsold returns. A straight split of 25 percent of the sales was offered and Delaney would guarantee the Ski Team $150,000 for the first year regardless of sales. When asked, however, Delaney declined to put the guarantee in writing. Delaney's mid-December bank balance was approximately $250.00. Delaney's proposal did not include any changes in the contents of the gift pack. In great detail Delaney expressed the view that the USSA and the USSF had made a mistake in giving an exclusive cosmetics endorsement to one of the smallest companies in the industry. He argued that the contract "restricts the USSA from 99 percent of the 1.5 billion dollar cosmetic and toiletry industry." Delaney's presentation was unmistakable—the contract with Bonne Bell is not in the interests of the U. S. Ski Team—breach it—come with us and make more money. The board voted to reject Delaney's proposal.

In October, 1971, Delaney entered into an agreement with the U. S. Olympic Committee under which it was authorized to use the Committee's endorsement and sell the sample packs for $1.50. Delaney kept 80 cents on each sale, and the balance went to the committee. Sales were made by Delaney's salesmen at exhibits and fairs throughout the country. Between October, 1971, and January, 1973, approximately 23,000 packs were sold.

At trial Bonne Bell denied the existence of the so-called ski market. The petitioners were unable to produce any evidence as to the size of the alleged "ski market" or Bonne Bell's share of the alleged "ski market." Further, no evidence was introduced relating the power of Bonne Bell to affect prices or to destroy competition in the cosmetics or toiletries industry.

REASONS FOR DENYING WRIT

I. THIS COURT REQUIRES EVIDENCE OF (1) SPECIFIC INTENT TO DESTROY COMPETITION OR BUILD A MONOPOLY; AND (2) ECONOMIC POWER SUFFICIENT TO PRODUCE A DANGEROUS PROBABILITY OF MONOPOLIZATION FOR THE OFFENSE OF ATTEMPTED MONOPOLIZATION.

This court has clearly delineated the elements of an "attempt to monopolize" under Section 2 of the Sherman Act. The classical statement of *Swift & Company v. United States*, 196 U.S. 375, 396 is quite specific in its definition of attempted monopolization.

> "The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such

> an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55.
>
> But when that intent *and* the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as the completed result." (Emphasis supplied).

Had the *Swift* court gone no further in its analysis of an attempt to monopolize, it might successfully be argued as Petitioners do here that the necessary "dangerous probability" is not the "forces of nature" plus "further acts", but solely the intent iself. Such an interpretation, however, was precluded by that Court when it stated:

> "Not every *act* that may be done *with intent* to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. The same distinction is recognized in cases like the present." (Emphasis supplied) 196 U.S. 375 at 402.

It is obvious from this statement that the mere coexistence of an act and intent to monopolize is an insufficient basis upon which to predicate a Section 2 attempt case. The *Swift* Court required, in addition, that there be evidence to prove the mandatory "proximity and degree". That evidence clearly is evidence which would logically war-

rant a finding that there is the requisite probability of success.

This precise issue was further discussed by the Court in *United States v. Winslow*, 227 U.S. 202 (1913). Under review was the District Court's dismissal of certain counts of a Sherman Act indictment. In *Winslow*, several large shoe machinery equipment manufacturers had pooled their resources by organizing the United Shoe Manufacturing Corporation. In discussing whether United Shoe could be guilty of an attempt to monopolize, Mr. Justice Holmes for a unanimous court held:

> "Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, *no intent could raise the conduct to the dignity of an attempt.*" 227 U.S. 202, at 218 (Emphasis supplied).

The mandatory importance of the economic power analysis in determining the "dangerous probability" of success has been forcefully enunciated by the Court in *Walker Process Equipment Inc. v. Food Machinery and Chemical Corporation*, 382 U.S. 172. The Court held:

> "To establish monopolization *or attempt to monopolize* a part of the trade or commerce under Section 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim *in terms of the relevant market* for the product involved." 382 U.S. 172 at 177 (Emphasis supplied).

Against this clear background, Petitioners initially assert in their brief that:

> "*Columbia Steel* suggests affirmatively that the specific intent suffices, stating that 'even though the restraint effected may be reasonable under Section 1, it may constitute an attempt to monopolize forbidden by Section 2 if a specific intent to monopolize may be shown'." Pg. 11 Petitioners' brief.

Petitioners for their own reasons, however, do not choose to relate the painstaking care that this Court in *United States v. Columbia Steel Co.*, 334 U.S. 495 took to delineate not only the relevant market but U. S. Steel's share of that market. In the paragraph following the language quoted by petitioners and in the same subject matter context, this Court stated:

> "United States Steel, despite its large sales, many acquisitions and leading position in the industry, has declined in the proportion of rolled steel products it manufactures in comparison with its early days. In 1901 it produced 50.1%; in 1911, 45.7%; in 1946, 30.4%. For the period 1937-1946, it produced 33.2%." 334 U.S. 495, at 533.

While the holding of the Court was based solidly upon a finding that there was no specific intent to monopolize, *Columbia Steel* neither suggests nor stands for the proposition now advanced by Petitioners. In fact, the very language quoted by Petitioners refers the reader to footnote 30 which, in turn, references footnote 24. Footnote 24 is a quotation from *United States v. Griffith*, 334 U.S. 100, 106-107. A portion of footnote 24 is illuminating:

> "For Section 2 of the act is aimed, *inter alia*, at the acquisition or retention of *effective market control*." (Emphasis supplied) 334 U.S. 100, at 107.

The stated emphasis of *Columbia Steel* and *Griffith* on "effective market control" does not suggest an abolition of the requirement of economic market power in an attempt case. Perhaps Petitioners tacitly acknowledge the weakness of their argument when they refer at page 12

of their brief to the "*somewhat* inconsistent line of decisions" of this Court.

Petitioners refer to *United States v. duPont & Co.*, 351 U.S. 377, 395-96, n.23, for the proposition that this Court distinguished a number of prior decisions:

> ". . . on the ground that they involved merely attempts or conspiracies to monopolize and therefore 'the scope of the market was not in issue.' "

Initially, it should be noted that this Court's consideration in that case was directed exclusively to the question of whether or not duPont *possessed monopoly power.* No consideration was given to Section 2 attempt to monopolize cases.

> "*Since the Government specifically excludes attempts and conspiracies to monopolize from consideration,* a conclusion that duPont has no monopoly power would obviate examination of these last two issues." 351 U.S. 377, at 381 (Emphasis supplied).

Petitioners, however, appear to have misread the language of the Court in footnote 23. The language used by the Court refers to "*combination* and conspiracy to monopolize"—not *attempts* or conspiracy to monopolize. In context, the portion of the footnote referred to by petitioners states:

> "In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, a conspiracy to monopolize trade in vegetable parchment was held to be a violation of Section 2. Parchment paper is obviously no larger a part of commerce than cellophane. *Recovery, however, was based on proven allegations of combination and conspiracy to monopolize, and the scope of the market was not in issue.* P. 560" (Emphasis supplied) 351 U.S. 377, at 395-396 n.23.

Interestingly enough, footnote 23 continues in pertinent part:

> "Also, this Court found in *United States v. Columbia Steel Co.*, 334 U. S. 495, that the *'relevant competitive market' for determining whether there had been an unreasonable restraint of trade (or an attempt to monopolize) was the market for 'rolled steel' products in an 11-state area.*" (Emphasis supplied) 351 U.S. 377, at 396 n.23.

Obviously, Petitioners' interpretation of footnote 23 must bow to the stated language—and the stated language leaves no room for any "interpretation".

American Tobacco v. United States, 328 U.S. 781, involved both an attempt to monopolize and a conspiracy to monopolize. With regard to attempted monopolization, this Court approved the following jury instruction given by the District Court:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment." 328 U.S. 781, 785.

Obviously, the instruction required the finding of a "dangerous probability" of monopolization in attempt cases. In granting the petition for certiorari, however, this Court expressly limited the issues:

> ". . . to the question whether actual exclusion of competitors is necessary to the *crime of monopolization* under Section 2 of the Sherman Act." 328 U.S. 781, at 784 (Emphasis supplied).

In the form presented to the Court, therefore, *American Tobacco* was not an attempt case. Petitioners have ripped the language quoted at page 11 of their brief from context. That language quoted in context reads:

> "It long has been settled, however, that a 'conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.' *United States v. Rabinowich*, 238 U. S. 78, 85, 35 S. Ct. 682, 683, 59 L. Ed. 1211; *Pinkerton v. United States*, 328 U. S. 640, 66 S. Ct. 1180, 1182. Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, i. e., to exclude actual and potential competitors from the cigarette field." 328 U.S. 781, at 789.

In summary, this Court has always required proof of economic power coupled with a specific intent to monopolize. None of the decisions cited by Petitioners in any way derogate from the clear lines drawn by this Court in *Swift*, *Winslow* and *Walker*. The United States Circuit Courts of Appeals have had little difficulty in applying guidelines established by this Court.

II. THE UNITED STATES COURTS OF APPEALS HAVE UNIFORMLY APPLIED THE DUAL REQUIREMENTS OF SPECIFIC INTENT AND ECONOMIC POWER UNDER THE GUIDELINES SET DOWN BY THIS COURT.

The record in this case discloses a total absence of economic data. This unassailable fact was affirmatively stated by both courts below.

> "Thus, in the absence of any showing by the plaintiff as to where the area of competition existed, or what clout the defendant corporation had therein, it was

> error for the trial judge to submit a Section 2 issue to the jury. No facts were before it upon which to base a verdict, and no facts from which inferences could properly be drawn." Petition for Writ, 20A, 21A. 10th Circuit Court of Appeals Opinion.

> "There was little, if any, evidence of the defendant's capacity to achieve or maintain a monopoly in that market." Petition for Writ, 35A. District Court Opinion.

Under established principles, the 10th Circuit required as a matter of law both a delineation of the relevant market and a showing of the economic power of the Bonne Bell in that market. Since there was a complete absence of proof, the 10th Circuit held that the trial court should not have submitted the attempted monopolization issue to the jury. This position is in accord with that taken by the other Circuit Courts of Appeal.

The 1st Circuit has specifically held that there must be a determination of economic power in the relevant market. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied* 421 U.S. 948 and *Walker v. Providence Journal Co.*, 493 F.2d 82, 87 (1st Cir. 1974).

The 3rd Circuit Court of Appeals has held that an essential element of an attempt to monopolize is that the actor must have sufficient market power to come dangerously close to achieving a successful monopoly. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348-1349 (3rd Cir. 1975).

The 5th Circuit requires a distinct analysis of the relevant market, the competitive structure of that market and the alleged offender's economic power within that market. *Panotex Pipeline Co. v. Petroleum Co.*, 457 F.2d

1279, 1288 (5th Cir. 1972), *cert. denied* 409 U.S. 845 (1972) and *Cliff Food Stores, Inc. v. Kroger,* 417 F.2d 203, 206-208 (5th Cir. 1969).

The 8th Circuit Court of Appeals has consistently required a showing of economic power in the relevant market. *The Morning Pioneer, Inc. v. The Bismarck Tribune Co.,* 493 F.2d 383 (8th Cir. 1974), *cert. denied* 419 U.S. 836, *Agrashell, Inc. v. Hammons Products Co.,* 479 F.2d 269, 284-286 (8th Cir. 1973), *cert. denied* 414 U.S. 1022, *Acme Precision Products, Inc. v. American Alloys Corp.,* 484 F.2d 1237, 1240 (8th Cir. 1973), *Hiland Dairy, Inc. v. The Kroger Company,* 402 F.2d 968, 971 (8th Cir. 1968), *cert. denied* 395 U.S. 961, *Kansas City Star Co. v. United States,* 240 F.2d 643, 663 (8th Cir. 1957), *cert. denied* 354 U.S. 923.

Petitioners assert that the 4th Circuit Court of Appeals adheres to the view that a showing of economic power is not necessary and cite *American Football League v. National Football League,* 205 F. Supp. 60 (D. Md. 1962), *aff'd* 323 F.2d 124 (4th Cir. 1963). While the District Court did state that there could be an attempt to monopolize without the offender actually possessing monopoly power (p. 65), that Court held not only that the defendant *did not possess monopoly power* but also that it *did not have the required specific intent* to destroy competition or build monopoly. The Court of Appeals, without discussing the issue of monopoly power, affirmed the lower court's decision on the basis that the requisite specific intent to monopolize had not been proven. (See p. 132 and n.18.). Petitioners' attempt to torture a *sub silentio* affirmance of a lower court's dicta into a rule of law was specifically rejected by the 4th Circuit Court of Appeals in *White Bag Co. v. International Paper Co.,* 1974-2 CCH Trade Cases Para. 75,188, p. 97,354 (4th Cir. 1974). In *White Bag,* the court stated:

> "We find no basis in the record for a conclusion of an attempt to monopolize. International had not increased its bag conversion capacity, and its share of the multiwall bag market had declined slightly over the preceding five years. The increases in paper production it was able to achieve went to its customers competing with it in the bag manufacturing business, not to enlarge its own production of multiwall bags. There is no suggestion that any merger or acquisition was contemplated; there was no conspiracy or action in concert with anyone else, and there is nothing else to indicate that there may be a substantial increase of International's nine per cent share of the multiwall bag market." at p. 97,356.

After a thorough discussion of not only the relevant market, but International's share of that market, the court concluded that:

> "There is no attempt to monopolize within the prohibition of Section 2 of the Sherman Act, unless there is both an intent to monopolize and a 'dangerous probability' that an actual monopoly will be achieved." at p. 97,357.

It is, therefore, apparent that the 4th Circuit has not taken the position that Petitioners contend.

Petitioners further argue that the decision below is inconsistent with the reasoning of the 7th Circuit referring to *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.,* 452 F.2d 579 (7th Cir. 1971), *cert. denied* 405 U.S. 1066. In *Kearney* the parties had stipulated that the relevant market was "multifunction machine tools with automatic tool changes" and there was conclusive evidence that plaintiff controlled "about one-third of that market." In addition, plaintiff had a dominant patent position that

was broad enough to cover "not only every tool-changing system now in use, but also every tool-changing system that might be conceived in the future." Against this backdrop of broad-based economic power in the relevant market fortified by patent monopoly, it is manifestly obvious that the 7th Circuit has not dispensed with the necessity of proving dangerous probability by market analysis coupled with a delineation of the party's position in that market. In *Kearney* the defendant *had proved* the requisite elements of economic clout:

> "Thus, the uncontroverted evidence establishes plaintiff's *capacity* to commit the offense, its intent to acquire the power to exclude competition from a significant share of the market and its use of predatory means to accomplish its purpose." (Emphasis supplied) 452 F.2d 579 at 599.

When Justice Stevens spoke in terms of the *capacity* of the offender to reach monopoly status, it is clear from the context of the opinion that he was referring to the economic ability of the offender to exert an effect on prices and to illegally enlarge its share of the market. A definition of *capacity* therefore requires, in the 7th Circuit, an analysis of the market and the alleged offender's position in that market. See also *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974), *Bernard Food Industries, Inc. v. Dretene Co.*, 415 F.2d 1279, *cert. denied* 397 U.S. 912 (7th Cir. 1969).

While the position of the 9th Circuit is not as clear as that of all other circuits, it is clear that the 9th Circuit at the present time will require some showing of economic power. The 9th Circuit, however, chooses to speak in terms of "a substantial claim of restraint of trade". Regardless of the verbiage, however, even that circuit has modified its position substantially since its

controversial decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied* 377 U.S. 993. In *Lessig*, the 9th Circuit flatly held that neither the probability of actual monoply nor a definition of the relevant market was essential in proving an attempt to monopolize. The *Lessig* position was subsequently approved in dicta in *Industrial Building Materials, Inc. v. Inter Chemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). While giving lip service to the *Lessig* decision, the 9th Circuit never reached a ruling on the attempt to monopolize portion of the case since the posture of the case before it was an appeal from a motion for summary judgment and the factual issues had, accordingly, not been developed at trial.

In 1971 the 9th Circuit decided *Cornwell Quality Tools Co. v. C. T. S. Co., Inc.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied* 404 U.S. 1049. In evaluating the attempted monopolization claim by C. T. S. the Court stated the following rule:

> "To convert Cornwell's conduct from vigorous competition into a separate Sherman Act offense, CTS had to prove two additional elements: (1) Cornwell had the specific intent to monopolize, and (2) it had sufficient market power to come dangerously close to success." (*Swift & Co. v. United States*, 196 U. S. 373) 446 F.2d 825 at 832.

The question of market power definition did not arise, however, because the Court concluded that there was insufficient evidence of specific intent.

In 1973 the 9th Circuit decided *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). In *Bushie*, the 9th Circuit expressly limited *Lessig* and *Industrial* to the facts stated in that opinion:

> "Bushie further contends that intent is the sole essential element of a claim of attempted monopolization,

and that no showing of Stenocord's power to monopolize the market is required. Language in our decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964) and *Industrial Building Materials, Inc. v. Inter Chemical Corp., supra,* 437 F.2d at 1344, suggests such a proposition, but the language must be read in the context of those cases. In both, the attempted monopolization claim was founded upon a substantial claim of restraint of trade, from which we indicated that specific intent required for a claim of attempt to monopolize could be inferred. No such foundation is present here. 460 F.2d at 120.

The Court referred to a "substantial claim of restraint of trade" as shorthand for the necessary economic power in a relevant market.

In 1973, the 9th Circuit decided *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied* 417 U.S. 932. In *Hallmark* the 9th Circuit retreated further from the often criticized and uncomfortable position it had taken in *Lessig* and *Industrial*. The 9th Circuit had always held that a necessary requirement of a Section 2 attempt case is proof of specific intent to monopolize, but in *Hallmark* the 9th Circuit specifically required that there be a showing of a "dangerous probability." Dangerous probability could be proved either by evidence of market power within the relevant market or by proof of a "substantial claim of restraint of trade." It is clear from *Hallmark* that the 9th Circuit has relegated the *Lessig* doctrine to something approaching a mere rule of evidence.

> "However, *Lessig, Industrial Building Materials*, and *Moore*, supra, hold that dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive conduct. Therefore evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made." 489 F.2d 8, at 12-13.

The *Hallmark* opinion was decided on the ground that there was insufficient evidence indicating that the defendant had the required specific intent to monopolize the market for aluminum huts in Vietnam. The question, therefore, of whether the necessary dangerous probability can, in fact, be shown by evidence of a specific intent absent evidence of market power was never reached.

In November, 1975, the 9th Circuit decided *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 1975-2 CCH Trade Cases Para. 60,617 (9th Cir. No. 44-10 94, etc., November 11, 1975). In *Sunkist*, the Court made a detailed analysis of substantial evidence both of Sunkist's power in the market as well as the boundaries of the relevant market itself. The jury found from the evidence that Sunkist possessed monopoly power in the relevant market. From this finding it is so obvious as to hardly require comment that Sunkist possessed sufficient market power to be guilty of an attempt to monopolize. The Court referred to what it denominated the "*Hallmark*" test and while a portion of that test is quoted in petitioners' brief at pages 12, 13, the entire quotation changes the context substantially:

> "*Hallmark* suggests that the requisite 'dangerous probability' of success can be inferred from either specific intent coupled with monopoly power or from 'proof

> of specific intent to set prices or exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose.' 489 F.2d at 12. Since the jury specifically found, in answer to written interrogatories, both specific intent and monopoly power, the *Hallmark* test is satisfied."

Where a jury specifically finds not only monopoly power but also a specific intent to obtain a monopoly position which by action ripens into a monopoly, it is clear that all requirements for the finding of an attempted monopoly are met. It may well be that the 9th Circuit has now construed the *"Hallmark"* test as being satisfied when a defendant has both specific intent and economic power. In any event, it is obvious that *Lessig* is not a viable decision even in the 9th Circuit. It has, in fact, been disapproved by District Courts sitting within that circuit. For example, see *No-Joint Concrete Pipe Co. v. American Concrete Agricultural Pipe Association*, Civil No. 63-928-MP (S.D. Cal. May 20, 1966); *Batris W. Perovich v. Pipe Linings, Inc.*, Civil No. 63-278-MP (C.D. Cal. April 6, 1967). See also *Bailey's Bakery, Ltd. v. Continental Baking Co.*, Civil No. 2113 (D. Hawaii, 1964) ("reasonable probability" of monopolization required); *Ampex Corp. v. Mach-Tronics, Inc.*, Civil No. 90943 (N.E. Cal. 1966) ("reasonable probability" that monopolization may occur required). This Court should allow *Lessig* to die its natural death.

CONCLUSION

A cursory study of this Court's decisions in the attempt area conclusively establishes that evidence of the defendant's economic ability in the relevant market has always been required. Bearing in mind that in the final analysis Section 2 is directed against monopolization, this

Court and the United States Courts of Appeals have uniformly refused to apply Section 2 attempt prohibitions absent some showing of a likelihood that the defendant's attempt will be successful. It should be axiomatic that no reasoned judgment of an actor's conduct can be formed in an evidentiary vacuum. Yet, this is the precise posture in which this case is presented. Based on the record, it is difficult to imagine a more inappropriate case for review.

As the matter now stands, petitioners will have their day in court and, accordingly, an opportunity to present relevant and meaningful evidence at trial. This Court, in the exercise of sound discretion, should refuse certiorari.

Respectfully submitted,

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